Supreme Court, U.S.
FILED
00 482 SEP 28 2000
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SUSAN G. BRADEN
Counsel of Record
WILLIAM D. OUTMAN, II
KEVIN M. O'BRIEN
TERESA A. GLEASON
MICHAEL E. MURPHY
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075

Counsel for Petitioner

Balmar Legal Publishing Services, Washington, DC 202-682-9800

96 pp +f/o

QUESTIONS PRESENTED

1. Whether the court of appeals misconstrued 26 U.S.C. § 4462(f)(3) in light of the decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the preclusive effect of the final judgment entered thereunder, and the "constitutional requirements" exception to the "no-interest" rule noted in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

2. Whether in holding the Harbor Maintenance Tax on exports unconstitutional in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the Court recognized that a taking of private property also occurred for which "just compensation" is required by the Fifth Amendment.

3. Whether the Government's retention of interest earned on monies collected under the unconstitutional Harbor Maintenance Tax on exports is a taking of private property for which "just compensation" is required by the Fifth Amendment.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, International Business Machines Corp. states that it is a New York corporation and has no parent company.

PARTIES TO THE PROCEEDINGS BELOW

United States v. *United States Shoe Corp.*, 523 U.S. 360 (1998) was a test case where the Court, in a unanimous decision, held that the Harbor Maintenance Tax violated the Export Clause of the United States Constitution. Over 4,000 cases filed in the United States Court of International Trade and the United States Court of Federal Claims were affected by this decision. *Id.* at 365, n.2. International Business Machines Corp. filed such an action in the United States Court of International Trade and also participated in the proceedings in *United States Shoe Corp.* as an amicus curiae in the United States Court of Appeals for the Federal Circuit and in this Court.

Following the Court's decision in *United States Shoe Corp.*, the United States Court of International Trade issued an order awarding interest in the instant case, *International Business Machines Corp.* v. *United States,* to allow the United States the opportunity to litigate in the appellate courts whether it must pay interest on HMT export refunds. International Business Machines Corp. was the plaintiff-appellee in this designated test case and is the petitioner in this Court. The United States was the defendant-appellant below and is the respondent in this Court.

The United States has estimated that approximately 7,000 cases now pending in the United States Court of International Trade will be affected by the decision in *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000), for which petitioner seeks this Court's review.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 LISTING ii

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Proceedings In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) And Final Judgment Entered Thereunder 4

B. The Related Proceedings In *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) 7

C. The Harbor Maintenance Trust Fund, Interest Earned Thereon, And Refunds Paid 9

REASONS FOR GRANTING THE WRIT 10

I. The Court Of Appeals Misconstrued 26 U.S.C. § 4462(f)(3) In Light Of The Decision In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), The Preclusive Effect Of The Final Judgment Entered Thereunder, And The "Constitutional Requirements" Exception To The "No-Interest" Rule Noted In *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986) 14

A. Deference Was Not Accorded This Court's Decision In *United States Shoe Corp.* And The Final Judgment Entered Thereunder 14

B. The "Constitutional Requirements" Exception To The "No-Interest" Rule Was Not Followed 17

II. In Holding The Harbor Maintenance Tax On Exports Unconstitutional, A Taking Of Private Property Was Recognized For Which "Just Compensation" Is Required By The Fifth Amendment 19

III. The Government's Retention Of Interest Earned On Monies Collected Under The Unconstitutional Harbor Maintenance Tax On Exports Is A Taking Of Private Property For Which "Just Compensation" Is Required By The Fifth Amendment 22

A. Under A *Per Se* Analysis 23

B. Under An Ad Hoc Analysis 25

CONCLUSION 28

APPENDICES

DECISIONS OF THE COURTS BELOW AND RELEVANT DECISION OF THIS COURT:

International Business Machines Corp. v. *United States*, 201 F.3d 1367 (Fed. Cir. 1999) 1a

United States Shoe Corp. v. *United States*, 20 Ct. Int'l Trade 206 (1996) 15a

United States v. *United States Shoe Corp.*, 523 U.S. 360 (1998) 22a

ORDERS OF THE COURTS BELOW:

International Business Machines Corp. v. *United States*, No. 98-1590 (Fed. Cir. June 13, 2000) (order denying stay of mandate (including June 9, 2000 errata sheet)) 30a

International Business Machines Corp. v. *United States*, No. 98-1590 (Fed. Cir. June 13, 2000) (judgment issued as mandate) 32a

International Business Machines Corp. v. *United States*, No. 98-1590 (Fed. Cir. May 31, 2000) (order denying rehearing and rehearing en banc) 33a

International Business Machines Corp. v. *United States*, No. 98-78 (Ct. Int'l Trade June 17, 1998) (judgment adopting all briefs on the issue of interest on Harbor Maintenance Tax refunds and the opinion relating to the same, Slip. Op. 96-032, filed in *United States* v. *United States Shoe Corp.*, Court No. 94-11-00668, entering money judgment and interest to permit the Government an opportunity to appeal the award of interest on export refunds) 35a

United States Shoe Corp. v. *United States*, 94-11-00668 (Ct. Int'l Trade May 20, 1998) (order concerning resolution of interest claims and other matters) 36a

United States Shoe Corp. v. *United States*, 924 F. Supp. 1191 (Ct. Int'l Trade 1995) 38a

CONSTITUTIONAL PROVISION INVOLVED:

The Fifth Amendment of the United States Constitution 41a

STATUTORY PROVISIONS INVOLVED:

Harbor Maintenance Tax (Selected Portions) 42a

Title 28 Judiciary and Judicial Procedures, 28 U.S.C. § 2411 ..... 43a

CONGRESSIONAL REPORTS

Annual Report To Congress On The Status Of The Harbor Maintenance Trust Fund For Fiscal Year 1998 (Dec. 1999) (Selected Portions).....44a

OTHER AUTHORITIES AND MISCELLANEOUS

Appellant's Oral Argument, *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) (No. 97-372) (March 4, 1998) (Selected Portion) 57a

TABLE OF AUTHORITIES

CASES: **Page**

Bechtold v. *City of Rosemount*, 104 F.3d 1062 (8th Cir. 1997).....17

Blonder-Tongue Labs, Inc. v. *University of Ill. Foundation*, 402 U.S. 313 (1971).....17

Board of Regents v. *Roth*, 408 U.S. 564 (1972).....23

Branch v. *United States*, 69 F.3d 1571 (Fed. Cir. 1995).....21

City of Monterey v. *Del Monte Dunes Ltd.*, 526 U.S. 687 (1999).....13, 20, 21

Coleman v. *Commissioner of Internal Revenue*, 791 F.2d 68 (7th Cir. 1986).....21

Crowell v. *Benson*, 285 U.S. 22 (1932).....22

Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) ..... *passim*

Ex Parte Siebold, 100 U.S. 371 (1880).....20

Fairbank v. *United States*, 181 U.S. 283 (1901) 18

Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).....12

First English Evangelical Lutheran Church of Glendale v. *County of Los Angeles*, 482 U.S. 304 (1987).....22

Good v. *United States*, 189 F.3d 1355 (Fed. Cir. 1999).....20

International Business Machines Corp. v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000)..... *passim*

Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 26

Lambert v. *City and County of San Francisco*, 120 S. Ct. 1549 (2000).....19

Library of Congress v. *Shaw*, 478 U.S. 310 (1986)..... *passim*

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)..... .....24, 26

MacDonald, Sommer & Frates v. *County of Yolo*, 477 U.S. 340 (1986) 13

Marbury v. *Madison*, 5 U.S. 137 (1803) 20

McQueen v. *South Carolina Dept. of Health and Environmental Control*, 530 S. E. 2d 628 (S.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3166 (U.S. Aug. 22, 2000) (No. 00-285) 24

Pace v. *Burgess*, 92 U.S. 372 (1876) 14

Parking Assoc. of Georgia, Inc. v. *City of Atlanta*, 515 U.S. 1116 (1995) 27

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 (1978) 26

Pennell v. *City of San Jose*, 485 U.S. 1 (1988) 21

Phillips v. *Washington Legal Foundation*, 524 U.S. 156 (1998) ..... *passim*

Reynoldsville Casket Co. v. *Hyde*, 514 U.S. 749 (1995) 20

Russell v. *SunAmerica Sec., Inc.*, 962 F.2d 1169 (5th Cir. 1992) 17

Shoshone Tribe of Indians v. *United States*, 299 U.S. 476 (1937) 19

Swisher Int'l, Inc. v. *United States*, 205 F.3d 1358 (Fed. Cir. 2000) 8

Tull v. *United States*, 481 U.S. 412 (1987) 12

United Home Rentals, Inc. v. *Texas Real Estate Comm'n*, 716 F.2d 324 (5th Cir. 1983) 17

United States v. *America Bar Endowment*, 477 U.S. 105 (1986) 15

United States v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) 15

United States v. *Haggar Apparel Co.*, 526 U.S. 380 (1999) 15

United States v. *Hill*, 506 U.S. 546 (1993) 15

United States v. *Security Industrial Bank*, 459 U.S. 70 (1982) 22

United States v. *Swisher Int'l, Inc.*, 205 F. 3d 1358 (Fed. Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 1554 (U.S. Sept. 15, 2000) (No. 00-415) ..... *passim*

United States v. *Sperry Corp.*, 493 U.S. 52 (1989) 12, 19

United States v. *United States Shoe Corp.*, 523 U.S. 360 (1998) ..... *passim*

United States Shoe Corp. v. *United States*, 114 F 3d 1564 (Fed. Cir. 1997) 6

United States Shoe Corp. v. *United States*, 924 F. Supp. 1191 (Ct. Int'l Trade 1995) 4

United States Shoe Corp. v. *United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995) 4, 8

United States Shoe Corp. v. *United States*, 20 Ct. Int'l Trade 206 (1996) 5, 14-15

Unity Real Estate Co. v. *Hudson*, 178 F.3d 649 (3d Cir.), *cert. denied*, 120 S. Ct. 396 (1999) 27

Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980) 4, 23

Wilson v. *United States*, 166 F.2d 57 (8th Cir. 1948) 17

CONSTITUTIONAL PROVISIONS:

The Export Clause of the United States Constitution .... *passim*

The Fifth Amendment of the United States Constitution ..... *passim*

STATUTORY PROVISIONS:

19 U.S.C. § 1505(c) 8

26 U.S.C. § 4461-62 2

26 U.S.C. § 4462(f)(3) ..... *passim*

28 U.S.C. § 1254(i) 2

28 U.S.C. § 1631 7

28 U.S.C. § 2411 ..... *passim*

28 U.S.C. § 2644 8

31 U.S.C. § 1322 10

CONGRESSIONAL REPORTS:

Annual Report To Congress On The Status Of The Harbor Maintenance Trust Fund For Fiscal Year 1998 (Dec. 1999) (Selected Portions) 3, 9, 10

OTHER AUTHORITIES AND MISCELLANEOUS:

Appellant's Oral Argument, *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) (No. 97-372) (March 4, 1998) (Selected Portion) 6

Charles Alan Wright, Arthur R. Miller & Edwin A. Cooper, *Federal Practice and Procedure* (1981) and 2000 Supplement 16, 17

No. 00-___

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

International Business Machines Corp. petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit entered on January 19, 2000.

OPINIONS BELOW

The Court, in a unanimous decision reported at 523 U.S. 360 and reprinted in the Appendix hereto ("App."), held that the Harbor Maintenance Tax violated the Export Clause of the United States Constitution. App. at 22a. Thereafter, the United States Court of International Trade entered a final judgment on June 17, 1998, reprinted at App. 35a, awarding petitioner a refund of monies paid under the Harbor Maintenance Tax on exports with interest, pursuant to 28 U.S.C. § 2411. The United States Court of Appeals for the Federal Circuit reversed that judgment in an opinion, reported

at 201 F.3d 1367 and reprinted at App. 1a, for which this petition for a writ of certiorari is filed seeking the Court's review.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit for which the Court's review is sought was entered on January 19, 2000. App. 1a. A petition for rehearing and a suggestion for rehearing en banc was filed and denied on May 31, 2000. App. 33a. The mandate issued on June 13, 2000. App. 32a. The Chief Justice of the Court extended the time in which to file a petition for a writ of certiorari to, and including, September 28, 2000.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(i).

CONSTITUTIONAL PROVISIONS INVOLVED

The Export Clause of the United States Constitution provides: "No Tax or Duty shall be laid on Articles exported from any State."

The Fifth Amendment of the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

Title 28, Judiciary and Judicial Procedure, provides, in relevant part, that "in any judgment of any court rendered . . . (against the United States) for any overpayment in respect of any internal-revenue tax, interest shall be provided." 28 U.S.C. § 2411.

The Harbor Maintenance Tax, enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461-4462, provides, in relevant part, that it "shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and

enforcement of internal revenue taxes." 26 U.S.C. § 4462(f)(3).

STATEMENT OF THE CASE

The questions presented by this petition for a writ of certiorari are interrelated to, and inseparable from, the Court's unanimous decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) holding that the Harbor Maintenance Tax ("HMT") violated the Export Clause of the United States Constitution. App. 22a. At the time the Court's decision was issued, approximately 4,000 cases were pending in the United States Court of International Trade ("the CIT") and the United States Court of Federal Claims seeking HMT export refunds with interest from the Harbor Maintenance Trust Fund ("HMT Fund"), including interest earned during the entire period these monies were invested by the Government in securities. *Id.* at 365 n.2.[1] Today, the United States ("Government") estimates there are approximately 7,000 cases seeking refunds of the HMT paid on exports with interest.[2]

Shortly after the Court's decision in *United States Shoe Corp.* was issued, the CIT designated a "test case" to determine whether interest must be paid on HMT export refunds. With the consent of all parties in *United States Shoe Corp.*, amici, and without objection of counsel representing other pending HMT refund cases, the CIT adopted and incorporated the record of *United States Shoe Corp.* into the instant case and entered a judgment awarding petitioner International Business Machines Corp. ("IBM") a refund of the monies it paid under the HMT on exports together with

---

[1] See, *e.g.*, Annual Report To Congress On The Status Of The Harbor Maintenance Trust Fund For Fiscal Year 1998, at 19 (Table 6) (Dec. 1999) ("Annual HMT Report to Congress"). App. 56a.

[2] See, *e.g.*, Brief for Defendant-Appellant United States at vii, *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) (No. 98-1590).

interest pursuant to 28 U.S.C. § 2411. App. 35a. The United States Court of Appeals for the Federal Circuit reversed that judgment, concluding there was no statutory basis for awarding such interest. See *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000). App. 1a. A brief discussion of these interrelated proceedings, the HMT Fund, interest earned thereon, and refunds paid follows.

A. The Proceedings In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) And Final Judgment Entered Thereunder.

A three-judge panel of the CIT held on October 25, 1995, that the HMT violated the Export Clause. See *United States Shoe Corp.* v. *United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). On December 4, 1995, the CIT issued a judgment awarding United States Shoe Corp. a refund of the monies it paid on exports under the HMT "together with interest and costs as provided by law." *United States Shoe Corp.* v. *United States*, 924 F. Supp. 1191 (Ct. Int'l Trade 1995). App. 40a. Thereafter, the CIT requested further briefing on that court's authority to award interest. On January 5, 1996, United States Shoe Corp. filed a motion in the CIT for the award of prejudgment and postjudgment interest on three grounds: "pursuant to statute [28 U.S.C. § 2411], the Fifth Amendment of the United States Constitution, and the equitable powers of this Court."[3] In support of this motion, IBM and fourteen other corporations assessed the HMT on exports filed a brief as amici curiae asserting, *inter alia*, that the Takings Clause of the Fifth

---

[3] See Memorandum In Support Of Plaintiff's Motion For The Award Of Prejudgment and Postjudgment Interest Pursuant to Slip-Op. 95-197 at 2, *United States Shoe Corp.* v. *United States* (Ct. Int'l Trade, Jan. 5, 1996) (No. 94-11-00668) ("[C]onsistent with the principles recognized in [*Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980)], the Government's collection of the HMT similarly constitutes a taking under the Fifth Amendment, such that just compensation, which necessarily includes interest, must be provided." *Id.* at 9).

Amendment of the United States Constitution ("Takings Clause") required the Government to pay interest on the HMT export refunds.[4] The Government responded to each of these arguments, including the Takings Clause claims asserted.[5]

On January 31, 1996, before the CIT ruled on the issue of United States Shoe Corp.'s entitlement to interest, the Government filed a notice with the United States Court of Appeals for the Federal Circuit appealing the CIT's December 4, 1995 final judgment that the HMT violated the Export Clause. Thereafter, on February 7, 1996, the CIT issued a memorandum opinion explaining that the interest awarded under its December 4, 1995 final judgment was authorized by 28 U.S.C. § 2411. See *United States Shoe Corp.* v. *United States*, 20 Ct. Int'l Trade 206, 207-08 (1996). App. 15a. Because the CIT determined there was a statutory basis for the award of interest, the Takings Clause claims asserted and briefed by all parties were not reached in that opinion. The CIT did not amend the December 4, 1995

---

[4] See Brief of Certain Amici Curiae Concerning Interest On Refunds of Harbor Maintenance Taxes at 19, *United States Shoe Corp.* v. *United States*, 20 Ct. Int'l Trade 206 (1996) (No. 94-11-00668) ("[T]he principle of just compensation under the Takings Clause requires payment of interest from the date of the collection of the [HMT] tax."). The other corporations joining IBM in support of the payment of interest were: Brown-Forman Corp.; Fisher Controls, Int'l. Co.; Hewlett-Packard Corp.; Minnesota Mining and Manufacturing Corp.; Seagate Technology Corp.; E.I. duPont de Nemours & Co.; New Holland North America, Inc.; Swisher International, Inc.; Aluminum Company of America; Alcoa International, S.A.; Alcoa Inter-America, Inc.; Alcoa Memory Products, Inc.; H-C Industries, Inc.; and The Stolle Corp.

[5] See Defendant's Opposition to Plaintiff's Motion For An Award of Prejudgment and Postjudgment Interest at 27-28, *United States Shoe Corp.* v. *United States* (Ct. Int'l Trade, Jan. 23, 1996) (No. 94-11-00668) ("Shoe and amici appear to allege three different takings theories: (i) that the loss of the use of the funds paid as harbor maintenance fees constitutes a taking of its property; (ii) that the nonwaiver of sovereign immunity for interest constitutes a taking; and (iii) that the HMF itself constitutes a taking.").

judgment on which the Government filed a notice of appeal. App. 17a.

When the United States Court of Appeals for the Federal Circuit affirmed the CIT's decision that the HMT violated the Export Clause, it affirmed the December 4, 1995 judgment, but did not comment on the CIT's February 6, 1996 opinion. See *United States Shoe Corp.* v. *United States*, 114 F.3d 1564, 1584 (Fed. Cir. 1997). When this Court held on March 31, 1998, that the HMT violated the Export Clause it also did not comment on whether the Government was required to pay interest on the HMT refunds due on exports. See *United States Shoe Corp.*, 523 U.S. at 369-70. App. 22a.[6] The Court affirmed the court of appeals' final judgment, which affirmed the final judgment entered by the CIT on December 4, 1995 holding that the HMT violated the Export Clause and awarding United States Shoe Corp. a money judgment "together with interest and costs as provided by law." App. 40a.

Shortly after the Court issued *United States Shoe Corp.*, the Government asked the CIT to designate a second "test case" to resolve "issues such as interest . . . which are implicated by most, if not all, of the HMT cases."[7] The CIT agreed and directed the Government "to select an appropriate case for the entry of judgment with interest." *United States Shoe Corp.* v. *United States*, Court No. 94-11-00668 (Ct. Int'l Trade, May 20, 1998) (order concerning resolution of interest

---

[6] During the March 4, 1998 oral argument, the Solicitor General was asked whether there were any other cases pending that bear on how the Court should decide whether the HMT was unconstitutional. The Government made no mention of any objection it may have had to the award of interest in the CIT's December 4, 1995 final judgment or the CIT's February 7, 1996 opinion explaining the reasons for the award of interest. App. 57a.

[7] See Defendant's Proposal For Further Proceedings In This And The Related Harbor Maintenance Tax Cases, *United States Shoe Corp.* v. *United States* at 10 (Ct. Int'l Trade, May 6, 1998) (No. 94-11-00668).

claims and other matters). App. 36a. With the consent of all parties in *United States Shoe Corp.*, amici, and without objection from counsel representing other pending HMT refund cases,[8] the CIT designated *International Business Machines Corp.* v. *United States*, Court No. 94-10-00065 (Ct. Int'l Trade) as a "test case" to determine whether the Government is required to pay interest on the HMT refunds due on exports.

B. The Related Proceedings In *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000).

On June 17, 1998, the CIT issued an "entry of judgment with interest in [*International Business Machines Corp.* v. *United States*, No. 94-10-00625] for the purpose of permitting the Government an opportunity to appeal." *International Business Machines Corp.* v. *United States*, Court No. 94-10-00065 (Ct. Int'l Trade, June 17, 1998) (order permitting the Government an opportunity to appeal the award of interest on export refunds). App. 35a. The CIT further ordered that "all briefs on the issue of interest and the opinion relating to the same . . . filed in *United States* v. *United States Shoe Corp.*, Court No. 94-11-00668 be deemed filed herein . . . [and] that interest pursuant to 28 U.S.C. § 2411 is owing [to petitioner IBM] on [$330,689.00] the aforesaid principal amount. . . . The payment obligation as to interest is stayed until the time for appeal expires or the appeal is finally resolved." App. 35a.

On August 7, 1998, the Government filed a notice of appeal in the United States Court of Appeals for the Federal Circuit. The sole legal issue on which the Government appealed was: "Whether the [CIT] erred in holding that

---

[8] The Court determined that the CIT had exclusive jurisdiction over all challenges to the HMT and suggested that plaintiffs with actions pending before the United States Court of Federal Claims seek an inter-court transfer to the CIT under 28 U.S.C. § 1631. *United States Shoe Corp.*, 523 U.S. at 366 n.3.

exporters may recover interest, pursuant to 28 U.S.C. § 2411, upon refunds of [the HMT].'"[9]

On January 19, 2000, the United States Court of Appeals for the Federal Circuit reversed the CIT's June 17, 1998 judgment awarding interest on the HMT export refunds because it determined that "the section of Title 28, § 2411, which provides for interest on tax refunds, is a 'provision of law relating to the administration and enforcement of internal revenue taxes' within the meaning of 26 U.S.C. § 4462(f)(3) and cannot apply to the HMT." *International Business Machines Corp.*, 201 F.3d at 1373. App. 11a.[10]

On March 6, 2000, a Combined Petition For Panel Rehearing and Rehearing En Banc ("Combined Petition") was filed requesting that the court of appeals reconsider the implications of its decision in light of this Court's decision in *United States Shoe Corp.*, the "constitutional requirements" exception to the "no-interest" rule recognized by the Court in *Library of Congress* v. *Shaw*, 478 U.S. 310, 317, n.5 (1986)

---

[9] See Brief for Defendant-Appellant United States at 1, *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) (No. 98-1590).

[10] The payment of interest also was determined by the court of appeals to be precluded under 28 U.S.C. § 2644 and 19 U.S.C. § 1505(c). The court of appeals determined that interest was not available under 28 U.S.C. § 2644 because petitioner IBM did not file an administrative customs protest nor appeal the denial of such protest. *International Business Machines Corp.*, 201 F.3d at 1374. In 1995, however, the CIT held that the mere acceptance of an exporter's payment of the HMT does not constitute a decision on which a protest can be made. See *United States Shoe Corp.* v. *United States*, 907 F. Supp. 408, 419 (Ct. Int'l Trade 1995) ("[I]t would be impossible to protest the Tax as 'there was no decision of Customs which [plaintiffs] could protest.'" (citation omitted)), *aff'd*, 114 F.3d 1564, 1569 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360, 365-66 (1998); *cf. Swisher Int'l, Inc.* v. *United States*, 205 F.3d 1358, 1365-69 (Fed. Cir. 2000) (holding that where a request for a refund of the HMT is filed, its denial is a protestable decision), *petition for cert. filed*, 68 U.S.L.W. 1554 (U.S. Sept. 15, 2000) (No. 00-127).

and the Takings Clause claims previously raised.[11] The Combined Petition was denied on May 31, 2000. App. 33a.

Upon application of petitioner, the Chief Justice extended the time in which to file a petition for a writ of certiorari to, and including, September 28, 2000. Accordingly, this petition is timely filed.

C. The Harbor Maintenance Trust Fund, Interest Earned Thereon, And Refunds Paid.

The HMT and the HMT Fund were established by Title XIV of the Water Resources Development Act of 1986. The HMT collected on exports were deposited by the United States into the HMT Fund until the Court's decision in *United States Shoe Corp.* was issued in 1998. In its most recent report to Congress, the Government estimated that approximately $5.386 billion has been collected and deposited into the HMT Fund. See Annual HMT Report To Congress, at 13 (Table 4). App. 53a. According to this report, $1.435 billion of this amount was collected on exports. *Id.* The Government recognizes that "[o]verall much uncertainty still exists with regard to the future balance of the Trust Fund because of the remaining outstanding issues associated with . . . continuing legal challenges to the HMT . . . [h]owever, the current [HMT Fund] balance [is] $1.289 billion entering FY 1999 and [is] projected to exceed $1.9 billion at the end of the year." *Id.* at vi. App. 47a.

The Government has earned substantial interest income on the monies deposited into the HMT Fund from investments in securities that mature during the year and which are

---

[11] See Combined Petition for Panel Rehearing and Rehearing En Banc By Plaintiff-Appellee International Business Machines Corp. at 4, *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) (No. 98-1590) ("IBM is entitled to interest under the Fifth Amendment to the Constitution as noted in *Shaw*, the Fifth Amendment requires the government to provide 'just compensation' when it deprives persons of private property.").

"available for transfer from the fund and . . . reported by the Treasury Department to the Office of Management and Budget." *Id.* at 16. App. 55a. During the period of fiscal years 1988-1998, the Government accrued approximately $267,873,000 in interest on the monies deposited into the HMT Fund. *Id.* at 17 (Table 6). App. 56a.

Following the Court's decision in *United States Shoe Corp.*, the Government began to refund monies collected under the HMT on exports. The refunds, however, were not withdrawn from the HMT Fund, but instead were paid out of a different fund, established by 31 U.S.C. § 1322, for repayment of amounts erroneously collected into the Treasury. App. 50a. The Government advised the CIT that, as of September 15, 1999, 2,891 judgments for HMT export refunds had been paid totaling approximately $690.3 million. See Defendant's Status Report at 3 and n.1, *United States Shoe Corp.* v. *United States* (No. 94-11-00668). None of the refunds made to date, however, included the payment of interest. The Government estimates that there are approximately 7,000 cases seeking refunds of the HMT paid on exports with interest. See, *e.g.*, Brief for Defendant-Appellant United States at vii, *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) (No. 98-1590).

REASONS FOR GRANTING THE WRIT

On September 15, 2000, the Solicitor General advised the Court in a petition for a writ of certiorari filed in a related HMT export refund case that "[i]n *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that the imposition of the [HMT] on exported goods violates the Export Clause of the Constitution . . . [and] the federal courts [are empowered] to provide a remedy for that unconstitutional exaction." *United States* v. *Swisher Int'l, Inc.*, 205 F.3d 1358 (Fed. Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 1554

(U.S. Sept. 15, 2000) (No. 00-415) at 6.[12] To provide that remedy and implement its final judgment in *United States Shoe Corp.*, with the consent of all parties in *United States Shoe Corp.*, amici, and without objection from counsel representing other pending HMT refund cases, the CIT designated this case, *International Business Machines, Corp.* v. *United States,* to award petitioner a refund of the HMT paid on exports with interest, pursuant to 28 U.S.C. § 2411, so that the Government could appeal whether it is required to pay interest on HMT refunds.

The initial question presented requests review of the court of appeals' statutory construction, in light of the Court's decision in *United States Shoe Corp.*, the preclusive effect of the final judgment entered thereunder, and the "constitutional requirements" exception to the "no-interest" rule. In addition, two questions are presented concerning the Court's Takings Clause jurisprudence. All of these questions are necessitated by the surprising decision of the United States Court of Appeals for the Federal Circuit denying petitioner and approximately 7,000 other exporter-taxpayers interest earned on monies collected under a tax that the Court declared unconstitutional over two years ago. Each of these questions provides the Court with a reason to grant the writ.

First, the court of appeals failed to defer to the Court's ruling in *United States Shoe Corp.* that the HMT is a tax on exports in "operation." Therefore, the petition initially seeks review of the court of appeals' interpretation of 26 U.S.C. § 4462(f)(3) to deny petitioner interest under 28 U.S.C.

---

[12] The Court should grant this petition irrespective of whether it decides to entertain the Government's petition for a writ of certiorari in *Swisher*. In the event the Court grants the petition in *Swisher,* however, the Court also should grant this petition so the Court is provided with an opportunity to evaluate the relationship between its decision in *United States Shoe Corp.* and both of these cases in a comprehensive manner to avoid inconsistent and unequitable resolutions since both of these cases seek the payment of interest on HMT refunds, but through different statutory and procedural routes.

§ 2411. See *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998) (*quoting Tull* v. *United States*, 481 U.S. 412, 417, n.3 (1987) (requiring the Court first to ascertain "'whether a construction of a statute is fairly possible by which the [constitutional] question may be avoided.'"). In the alternative, this question seeks review of the court of appeals' failure to recognize the preclusive effect of the final judgment entered in *United States Shoe Corp.*, and the "constitutional requirements" exception to the "no-interest" rule noted by the Court in *Shaw*, 478 U.S. at 317, n.5.

The second question also arises from *United States Shoe Corp.*, wherein the Court stated: "In [*United States* v. *Sperry Corp.*, 493 U.S. 52 (1989)] . . . we noted that the Takings Clause imposes fewer constraints . . . than does the dormant Commerce Clause. See 493 U.S. at 61, n.7 . . . *A fortiori*, therefore, [the analysis under] the Takings Clause is less restrictive than the Export Clause." *United States Shoe Corp.*, 523 U.S. at 369. The Court in *United States Shoe Corp.* was not asked to consider whether in holding that the HMT violated the Export Clause, a Takings Clause violation is subsumed. The Court's *obiter dictum*, however, implied as much. *Id.* The decision of the court of appeals, however, requires petitioner now to ask whether in holding the HMT on exports unconstitutional, the Court recognized that a taking of private property also occurred for which "just compensation" is required by the Takings Clause of the Fifth Amendment. If so, the court of appeals' decision becomes irrelevant, since the Takings Clause of the Fifth Amendment requires the payment of interest as a matter of law. Accordingly, the Court should grant the petition to answer this question.

If the Court does not grant the petition and reverse or vacate the judgment of the court of appeals, the CIT will be required to adjudicate petitioner's Takings Clause claims. Therefore, the third question asks the Court to determine whether the Government's retention of interest earned on monies collected under the unconstitutional HMT on exports

should be analyzed by the CIT as a *per se* taking or under an ad hoc analysis, and if so, how that analysis should be conducted. The Court's prior assertion of jurisdiction in *United States Shoe Corp.* and the Court's expressed disfavor of "repetitive" and "piecemeal litigation" recommends the exercise of the Court's discretion to answer this question so that issues concerning the application of the ad hoc analysis raised in several of the Court's more recent Takings Clause cases may be addressed for the benefit of the CIT and other lower courts that must apply an ad hoc analysis to Takings Clause claims. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes Ltd.*, 526 U.S. 687, 698-99 (1999), *citing MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 350 n.7 (1986) (stating that a property owner should not be required to resort to piecemeal litigation to determine a Takings Clause claim); *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 173-75 (1998) (Souter, J., dissenting) (recommending that the Court consider issues of property interest, taking, and just compensation together rather than in a piecemeal fashion).

It is understandable that the Government wishes to retain the substantial financial benefit it has derived from investing monies collected under an unconstitutional tax, so it may fund activities without seeking congressional appropriations. App. 60a. The Court should grant this petition to address whether such activity is sanctioned or an unlawful or unconstitutional abuse of the sovereign's power.

I. The Court Of Appeals Misconstrued 26 U.S.C. § 4462(f)(3) In Light Of The Decision In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), The Preclusive Effect Of The Final Judgment Entered Thereunder, And The "Constitutional Requirements" Exception To The "No-Interest" Rule Noted In *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

A. Deference Was Not Accorded This Court's Decision In *United States Shoe Corp.* And The Final Judgment Entered Thereunder.

In *United States Shoe Corp.*, the Court held that "[t]he HMT bears the *indicia* of a tax . . . [and] 'we must regard things rather than names,' *Pace* v. *Burgess*, 92 U.S. [372,] at 376 [(1876)], in determining whether an imposition on exports ranks as a tax. The crucial question is whether the HMT is a tax on exports in *operation* as well as nomenclature." *United States Shoe Corp.*, 523 U.S. at 367 (emphasis added). The Court determined that the HMT on exports was a tax "in operation," but did not discuss the application of this ruling to 26 U.S.C. § 4462(f)(3) of the HMT and 28 U.S.C. § 2411. If the Court meant by "operation" that the HMT is a tax in how it functions or works, then HMT refunds should be provided in the same manner as other federal tax refunds.

The HMT provision at issue in this case provides that: "[t]he [HMT] shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." 26 U.S.C. § 4462. In awarding interest under 28 U.S.C. § 2411, however, the CIT held that "monetary relief granted by the court would not constitute either 'administration' or 'enforcement' of the HMT as envisioned by 26 U.S.C. § 4462(f)(3). That section is limited to matters of routine administration and enforcement by an agency." *United States*

Shoe Corp. v. *United States*, 20 Ct. Int'l Trade at 208. App. 19a.

The court of appeals reversed the CIT holding that "Section 4462(f) provides that the HMT is to be treated as a customs duty, and not as a tax, for purposes of statutory provisions relating to administration and enforcement. Because § 2411 . . . is a provision of law relating to the administration and enforcement of taxes, the HMT statute precludes the application of § 2411 to provide interest on refunds of the HMT." *International Business Machines Corp.*, 201 F.3d at 1374. App. 13a. Instead of embarking on a *de novo* review of the definition of "administration and enforcement," the court of appeals should have construed 26 U.S.C. § 4462(f)(3) in deference to the Court's prior determination that the "HMT is a tax . . . in operation." *United States Shoe Corp.*, 523 U.S. at 367.

Petitioner acknowledges that there is no conflict among the federal courts of appeals regarding the statutory component of the question presented. Despite the absence of such conflict, the petition should be granted because of the Court's prior exercise of its jurisdiction in *United States Shoe Corp.* to ascertain the constitutionality of the HMT under the Export Clause and interpret the HMT in that context, and the need to address the scope of the final judgment entered thereunder. Moreover, because Congress required that the HMT be subject to initial review exclusively by the CIT and the United States Court of Appeals for the Federal Circuit, no conflict among the federal courts of appeals will ever occur. As the Solicitor General stated in the Government's recent petition for a writ of certiorari in *Swisher*, "[i]n similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 383 (1999); *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *America Bar Endowment*, 477 U.S. 105, 109 (1986)."

Swisher, 205 F.3d 1358 (Fed. Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 1554 (U.S. Sept. 15, 2000) (No. 00-415) at 14. The same considerations are also present in this case and weigh in favor of the Court's exercise of its discretion to grant the petition to clarify the meaning of its ruling that the "HMT is a tax . . . in operation," as applied to 26 U.S.C. § 4462(f)(3) and 28 U.S.C. § 2411.

The court of appeals also failed to defer to the preclusive effect of the final judgment issued in *United States Shoe Corp.* The judgment entered by the CIT on December 4, 1995, holding that the HMT violated the Export Clause and awarding *United States Shoe Corp.* a refund of monies it paid on exports under the HMT "together with interest and costs as provided by law," was the final judgment that was affirmed by the United States Court of Appeals for the Federal Circuit and subsequently by this Court's decision in *United States Shoe Corp.* If the Government wished to contest the award of interest on potential HMT export refunds, as a matter of law, the time for the Government to raise that issue was when it appealed the CIT's December 4, 1995 final judgment or certainly when that judgment was before this Court. App. 57a. The Government did not raise this issue on either occasion and therefore waived that opportunity.

The "test case" procedure initiated by the CIT to implement the Court's decision in *United States Shoe Corp.*, took place long after the pleading stage when *res judicata* generally is required to be asserted as an affirmative defense. Nevertheless, the appellate courts, including this Court, may raise considerations of preclusion *sua sponte*. See 18 Charles Alan Wright, Arthur R. Miller and Edwin H. Cooper, Federal Practice and Procedure § 4405, at 33-34 and note 4 (1981) ("As courts became increasingly concerned with their own interests in forestalling repetitive litigation, a few have raised the question of preclusion on their own motion, and it has even been raised by appellate courts for the first time on appeal."). As a comparison of the number of appellate cases cited in Federal Practice and Procedure § 4405 note 4 in the

1981 and the 2000 Supplement reveals, federal appellate courts increasingly have raised the preclusive effect of prior judgments on their own initiative. See, *e.g.*, *Bechtold* v. *City of Rosemount*, 104 F.3d 1062, 1068-69 (8th Cir. 1997) (*quoting Wilson* v. *United States*, 166 F.2d 527, 529 (8th Cir. 1948)) ("[T]here is more at stake than relitigation between the parties. [*Res judicata* principles] . . . . also involve 'the right of the appellate court to protect itself from litigation by a party who has already had his right finally determined in the district court.'").

Therefore, should the Court exercise its discretion to grant the petition to answer this question, the Court should direct the parties, as it did in *Blonder-Tongue Labs, Inc.* v. *University of Ill. Foundation*, 402 U.S. 313, 317-20 (1971), to brief the question of whether principles of estoppel and repose bar the Government from retaining interest earned on monies collected under the HMT on exports because of the scope of the final judgment entered in *United States Shoe Corp.* "as a means to affirm the district court decision below." *Russell* v. *SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992) (*quoting United Home Rentals, Inc.* v. *Texas Real Estate Comm'n*, 716 F.2d 324, 330 (5th Cir. 1983)). App. 57a.

B. The "Constitutional Requirements" Exception To The "No-Interest" Rule Was Not Followed.

The court of appeals justified its interpretation of 26 U.S.C. § 4462(f)(3) claiming: "[w]e are bound by the ["no-interest"] rule [in *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-16 (1986)] that the United States is liable for interest only if Congress has waived sovereign immunity by expressly consenting to an award of interest." *International Business Machines Corp.*, 201 F.3d at 1372. The court of appeals, however, remarkably avoided recognizing, much less following, one of the express exceptions to the "no-interest" rule noted by the Court in *Shaw*, which governs where "constitutional requirements" are present. *Shaw*, 478 U.S. at 317, n.5. Two constitutional issues were raised in this case.

First, the Government's continued retention of interest on HMT export refunds contravenes the Export Clause's absolute ban on taxation. As this Court recognized in *Fairbank* v. *United States*, 181 U.S. 283 (1901) nearly a century ago:

> [T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden . . . [I]t is clear that the framers of the Constitution intended not merely that *exports should not be made a source of national revenue to the National Government,* but that the National Government should put nothing in the way of burden upon such exports.

Id. at 292-93 (emphasis added).

This Court has determined that the HMT is an unconstitutional burden on exports. The failure to pay interest on HMT export refunds is no less a burden in that it allows the Government to continue to derive national revenue from violating the Export Clause. Indeed, the Government has thus far accrued substantial interest traceable to the assessment of the HMT on exports, and as it continues to withhold interest, it accrues, and compounds additional interest on those sums. Thus, the HMT on exports has functioned, and will continue to function, as a source of significant national revenue, the return of the principal notwithstanding.

Second, Takings Clause claims initially were asserted and preserved in the CIT proceedings in *United States Shoe Corp.*, and later incorporated by the CIT into the instant case with consent of the parties and amici in *United States Shoe Corp.*, and without objection of counsel in related HMT refund cases. App. 35a. The Government did not assert sovereign immunity to deny payment of the HMT refunds on exports and therefore may not now resurrect sovereign immunity simply to avoid paying interest on the monies already refunded. See *Washington Legal Foundation*, 524 U.S. at 166 ("any interest . . . follows principal").

For these reasons, the Court should grant the petition to answer this question and reverse[13] or vacate the judgment of the court of appeals, which did not accord deference to the Court's decision in *United States Shoe Corp.*, the final judgment entered thereunder, or follow the "constitutional requirements" exception to the "no-interest" rule in *Shaw*.

II. In Holding The Harbor Maintenance Tax On Exports Unconstitutional, A Taking Of Private Property Was Recognized For Which "Just Compensation" Is Required By The Fifth Amendment.

In *United States Shoe Corp.*, the Court in *obiter dictum* stated, "[i]n [*United States* v. *Sperry Corp.*, 493 U.S. 52 (1989)] . . . we noted that the Takings Clause imposes fewer constraints . . . than does the dormant Commerce Clause. See 493 U.S. at 61, n. 7 . . . a *fortiorari*, therefore, [analysis under] the Takings Clause is less restrictive than the Export Clause." *United States Shoe Corp.*, 523 U.S. at 369. Therefore, the second question of the petition asks whether in holding the HMT unconstitutional, as applied to exports, the Court recognized that the Takings Clause also was violated. If so, under the Court's longstanding precedent, the Takings Clause of the Fifth Amendment requires the payment of interest on HMT export refunds, and the decision of the United States Court of Appeals for the Federal Circuit holding that 26 U.S.C. § 4462(f)(3) precludes an award of interest under 28 U.S.C. § 2411 becomes irrelevant and should be vacated. See *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 497 (1937) (Cardozo, J.) ("[T]here having been an appropriation of property within the meaning of the Fifth Amendment, [the

---

[13] In the alternative, the Court should consider summary reversal. See, *e.g.*, *supra* at 16-17 (the preclusive effect of the final judgment entered after *United States Shoe Corp.*); *Lambert* v. *City and County of San Francisco*, 120 S. Ct. 1549, 1552 (2000) (Scalia, J., joined by Kennedy and Thomas, JJ., dissenting from the denial of certiorari) (summary reversal and remand suggested where a Takings Clause claim was asserted).

fact is unimportant] that the jurisdictional act is silent as to an award of interest. . . . Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages.").

In this case, the question of whether an unconstitutional tax is a taking for which "just compensation" is required by the Fifth Amendment goes to the scope of the judgment entered in *United States Shoe Corp.* and is appropriate for this Court's review, particularly since the relationship between an otherwise unconstitutional law and the Takings Clause has been raised in recent Court cases, but not resolved.

For example, in *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749 (1995), Justice Scalia, in a concurring opinion joined by Justice Thomas, observed:

> A court does not -- in the nature of things it *can* not -- give a "remedy" for an unconstitutional statute, since an unconstitutional statute is not in itself a cognizable "wrong." . . . In fact, what a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case "*disregarding* the [*unconstitutional*] law," *Marbury* v. *Madison*, 5 U.S. 137 (1803) . . . because a law repugnant to the Constitution "is void, and is as no law," *Ex parte Siebold*, 100 U.S. 371, 376 (1880). Thus, *if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy.*

Id. at 759-60 (citations omitted) (emphasis and parenthetical in original and emphasis added).

Last term in *Del Monte Dunes* the Court acknowledged that the Government's unconstitutional actions, under some circumstances, independently may violate the Takings Clause of the Fifth Amendment:

> We reject [the] conclusion [that because the Constitution allows the Government to take property for public use, a taking for that purpose cannot be tortious or unlawful]. Although the government acts lawfully when . . . it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation . . . When the government repudiates this duty . . . by denying just compensation in fact . . . it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well.

Del Monte Dunes, 526 U.S. at 717; cf. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting), ("[C]ould a court apply . . . [a] Takings Clause analysis when [a] violation means the law's invalidation?"); *Branch* v. *United* States, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (a "tax assessment . . . might be challenged on Takings Clause or other constitutional grounds, but if those assessments survived constitutional scrutiny, the consequent enforcement action, including seizure of the property, could not be challenged as a taking."); *Coleman* v. *Commissioner of Internal Revenue*, 791 F.2d 68, 70 (7th Cir. 1986) ("the [federal] government might try to achieve through special taxes what the Takings Clause of the Fifth Amendment forbids if done directly.").

Since the question presented concerns the scope of the final judgment as a result of the Court's decision in *United States Shoe Corp.*, it is one that the Court can and should address. The question is ripe for review because the Takings Clause claims asserted in *United States Shoe Corp.* and in this case concern a specific property interest of petitioner and of other exporters in the thousands of other pending cases where the payment of interest on HMT export refunds continues to be unresolved. See *Pennell* v. *City of San Jose*, 485 U.S. 1, 16-17 (1988) (Scalia, J., concurring in part and dissenting in part) ("'[W]e must not disregard the posture in which this case comes before us [on a "takings" claim]

. . . because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.'" (citation omitted)).[14]

III. The Government's Retention Of Interest Earned On Monies Collected Under The Unconstitutional Harbor Maintenance Tax On Exports Is A Taking Of Private Property For Which "Just Compensation" Is Required By The Fifth Amendment.

Since further proceedings before the CIT will be required if the Court does not reverse or vacate the decision of the court of appeals, the Court should grant the petition to determine whether the Government's retention of interest earned on monies collected under the unconstitutional HMT on exports should be analyzed as a *per se* taking or under an

---

[14] Petitioner anticipates that the Government will oppose this petition by arguing that the Takings Clause claims either have been waived or are not ripe. Neither is the case. See Statement of Case *supra* Sections A, B.

The Takings Clause claims at issue initially were raised before the CIT in *United States Shoe Corp.* and subsequently were incorporated into this case by order of the CIT. *Id.* App. 36a. Both the statutory and constitutional arguments, including Takings Clause claims, were briefed in the remedial proceedings at the CIT. By initially addressing the statutory basis for the interest claimed, the CIT was faithful to the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States* v. *Security Industrial Bank*, 459 U.S. 70, 78 (1982) (*quoting Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)). Moreover, the Government did not appeal the Takings Clause claims in the Federal Circuit. See *supra* 7 and note 9. Therefore, the Takings Clause claims were not waived and are ripe for this Court's consideration. See, *e.g.*, *Lucas*, 505 U.S. at 1012, n.3 ("[I]t is appropriate for us to address . . . [the takings claim] as if the case were here on the pleadings alone. [Petitioner] properly alleged injury in fact . . . [n]o more can be reasonably demanded. *Cf. First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 312-313 (1987).").

ad hoc analysis, and if so, how that analysis should be conducted.

A. Under A *Per Se* Analysis.

The first element of a Takings Clause claim requires the identification of a specific private property interest. The Court's decision in *Washington Legal Foundation* instructed the lower courts to determine the "existence of a property interest" by "existing rules or understandings that stem from an independent source such as state law." *Washington Legal Foundation*, 524 U.S. at 164 (*quoting Board of Regents* v. *Roth*, 408 U.S. 564 (1972)). As evidenced by the extensive citations recited in that opinion, virtually every state in the country, including New York in which petitioner IBM is incorporated, follows the general rule that "any interest . . . follows the principal." *Washington Legal Foundation*, 524 U.S. at 166 and n.5; *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) (holding "[t]he earnings of a fund are incidents of ownership . . . and are property just as the fund itself is property."). Therefore, in *Washington Legal Foundation* the Court held that interest earned on client funds held in a trust account is "private property" protected by the Takings Clause. Accordingly, under the Court's decisions in *Webb's Fabulous Pharmacies* and *Washington Legal Foundation*, the interest earned on monies collected under the HMT on exports certainly is private property protected by the Fifth Amendment.

As to the second element of whether a "takings" occurred, the Government concedes that an "unconstitutional exaction" has occurred. See *Swisher Int'l, Inc.*, 205 F.3d 1358 (Fed. Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 1554 (U.S. Sept. 15, 2000) at 6. Justice Breyer's dissenting opinion in *Washington Legal Foundation*, in which Justices Stevens, Souter, and Ginsburg joined, agrees that *Webb's Fabulous Pharmacies* holds that where, as here, "ordinary kind of principal [is maintained] in an interest-bearing account (which interest the State unjustifiably keeps) *takes* 'private property for public use without just compensation.'"

Washington Legal Foundation, 524 U.S. at 182 (Breyer, J., dissenting) (emphasis added). Moreover, the Government in this case does not dispute the fact that the corpus of the HMT Fund was created by monies collected under an unconstitutional tax on exports and that interest has been earned on those monies by the Government's investment in securities. App. 56a. Therefore, whether petitioner had a reasonable basis to expect that interest would be earned on the unconstitutional tax imposed is irrelevant because interest was earned in fact and "unjustifiably" kept. Accordingly, the "taking" element of a Takings Clause claim is met.[15]

---

[15] On August 22, 2000, a petition for a writ of certiorari was filed in *McQueen* v. *South Carolina Dept. of Health and Environmental Control*, 530 S. E. 2d 628 (S.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3166 (U.S. Aug. 22, 2000) (No. 00-285). The *McQueen* petition seeks the Court's review of whether a property owner must prove that a regulation deprives the owner of all economically beneficial use of property, which the Court held in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) was a *per se* taking, but also that the regulation frustrates the owner's distinct investment-backed expectations, as the United States Court of Appeals for the Federal Circuit, Eighth Circuit, and Ninth Circuit erroneously have held in decisions issued after *Lucas*.

Although petitioner in this case contends that its "reasonable, investment-backed expectations" are irrelevant since interest was earned in fact on monies collected under the unconstitutional HMT on exports, petitioner agrees with the *McQueen* petition that the Court should not permit the lower courts to erode the bright line standard established in *Lucas* by grafting ad hoc elements into the *per se* analysis of Takings Clause claims. For example, the Federal Circuit in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) held that a "lack of reasonable, investment-backed expectations defeats his takings claim as a matter of law." *Id.* at 1363. As the *McQueen* petition noted, that particular court is "mired in internal conflict over the question presented." *McQueen* v. *South Carolina Dept. of Health and Environmental Control*, 530 S. E. 2d 628 (S.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3166 (U.S. Aug. 22, 2000) (No. 00-285) at 9, n. 6.

Since the CIT will be obliged to follow the precedent of the Federal Circuit if it is required to adjudicate petitioner's Takings Clause claims, it is important that the disturbing shift by the Federal Circuit to undermine the *per se* standard established in *Lucas* be corrected by this Court at the

Furthermore as Justice Kennedy recently observed, there are circumstances where "the Government's self-enrichment may make it all the more evident a taking has occurred." *Eastern Enterprises,* 524 U.S. at 544 (Kennedy, J., concurring in part and dissenting in part). The Government's continued "self-enrichment" by retaining interest earned on monies collected under an unconstitutional tax is one of those circumstances. Providing HMT export refunds without interest is not an adequate remedy at law because it denies petitioner and approximately 7,000 other exporters "just compensation," a right afforded by the Takings Clause of the Fifth Amendment of the United States Constitution. To be sure, the Government may impose a user fee on petitioner. The Government's retention of interest earned on monies collected under the HMT on exports, however, is not a lawful manner in which to assess such a fee.

Accordingly, the Court should grant the petition to determine, in light of *United States Shoe Corp.*, whether retention of such interest should be analyzed as a *per se* taking "without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015.

B. Under An Ad Hoc Analysis.

A plurality of the Court in *Eastern Enterprises,* recently held that "economic regulation . . . may nonetheless *effect a taking* . . . [b]y operation of [an] Act [of Congress], . . . [where the affected party is] 'permanently deprived of those assets[.]'" 524 U.S. at 523 (emphasis added). Potential plaintiffs were cautioned that "a party challenging governmental action as an unconstitutional taking bears a substantial burden . . . [dependent on] an examination of the 'justice and fairness' of the government action [which] . . . is

---

earliest opportunity. Therefore, should the Court decline to address the question presented by the *McQueen* petition, the third question in the instant petition affords the Court an opportunity to do so.

essentially ad hoc and fact intensive." *Id.* at 523. In this case, the court of appeals determined that, as a matter of law, 26 U.S.C. § 4462(f)(3) of the HMT precludes the payment of interest under 28 U.S.C. § 2411. *International Business Machines Corp.*, 201 F.3d at 1374. Assuming *arguendo* that such a determination is correct, the HMT on exports also may "effect a taking," which requires the case to be remanded to the CIT for an ad hoc analysis.

On other occasions, the Court has indicated that an ad hoc analysis requires the lower courts to consider such factors as "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *see also Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979) (evaluating a regulatory takings claim requires consideration of "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action.").

Justice Souter's dissenting opinion in *Washington Legal Foundation*, in which Justices Stevens, Ginsburg, and Breyer joined, however, raises an issue that goes to the heart of the ad hoc analysis. Therein, Justice Souter asserts that where "regulatory structure" is "relevant to the property issue," the lower courts should be required to conduct an analysis of the factors considered in *Penn Central*, *i.e.*, "the nature of the government's action, its economic impact, and the degree of any interference with reasonable, investment-backed expectations." *Washington Legal Foundation*, 524 U.S. at 176 (Souter, J., dissenting). A similar observation was made by Justice Kennedy in *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations. There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a

proper exercise of governmental authority, property tends to become what courts say it is.").

Although the ad hoc analysis described by Justice Souter's dissenting opinion in *Washington Legal Foundation* essentially is the same as that discussed in the plurality decision in *Eastern Enterprises*, the latter decision did not address whether that analysis should be conducted as part of the "private property" inquiry, as Justice Souter's dissenting opinion suggests, or whether it is probative of whether the governmental action is a "taking" -- or whether the analysis should be conducted to determine whether both of these elements of a Takings Clause claim have been met.

The Court has not yet had an appropriate opportunity to reconcile these potentially differing approaches to the ad hoc analysis suggested in recent opinions. This case provides the Court with a timely opportunity to do so and clarify how an ad hoc analysis should be conducted when an Act of Congress or regulation effects a taking. All of the elements of a Takings Clause claim can be considered together, as Justice Souter suggested in *Washington Legal Foundation*, and, as Justice Kennedy and Justice Thomas have candidly admitted, the Court's Takings Clause jurisprudence has caused confusion in the lower courts, particularly in applying the ad hoc analysis. See, *e.g.*, *Eastern Enterprises*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part) ("[T]he regulatory taking concept . . . it is fair to say has proven difficult to explain in theory and implement in practice."); *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 658 (3d Cir.), *cert. denied*, 120 S. Ct. 396 (1999) ("The splintered nature of the Court makes it difficult to distill a guiding principle from *Eastern*."); *Parking Assoc. of Georgia, Inc.* v. *City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari) ("In the past, the confused nature of some of our takings case law and the fact specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict.").

Considering the procedural background of this case and the Court's prior exercise of jurisdiction, the petition should be granted to answer this question so that the CIT, as well as other lower courts that may be utilizing an ad hoc analysis in other Takings Clause cases, may have further clarification concerning issues raised by the Court's recent decisions regarding its application.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

SUSAN G. BRADEN
Counsel of Record
WILLIAM D. OUTMAN, II
KEVIN M. O'BRIEN
TERESA A. GLEASON
MICHAEL E. MURPHY
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075

Counsel for Petitioner

Dated: September 28, 2000

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1590

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

William D. Outman, II, Baker & McKenzie, of Washington, DC, argued for plaintiff-appellee. With him on the brief were Kevin M. O'Brien, Teresa A. Gleason, and Michael E. Murphy.

Lara Levinson, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief were David W. Ogden, Acting Assistant Attorney General, David M. Cohen, Director, Jeanne E. Davidson, Deputy Director, and Todd M. Hughes, Attorney. Of counsel on the brief was Richard McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC.

Patrick D. Gill, Rode & Qualey, of New York, New York, for amicus curiae Capital-Mercury Shirt Corp. Melvin S. Schwechter, LeBoeuf, Lamb, Greene & MacRae, L.L.P., of Washington, DC, for amicus curiae Rapid Industrial Plastics Co. Inc. Steven H. Becker, Coudert Brothers, of New York, New York, for amicus curiae Alfred C. Toepfer International, Inc. Peter Jay Baskin, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, New York, for amicus curiae Bunge

Corporation. Steven P. Florsheim, Grunfeld, Desiderio Leibowitz & Silverman LLP, of New York, New York for amicus curiae Mondial International Corp. Munford Page Hall, II, Dorsey & Whitney, LLP, of Washington, DC, for amicus curiae New Holland North America, Inc. Barry E. Cohen, Crowell & Moring, LLP, of Washington, DC for amicus curiae Elliott Turbomachinery Company. Brian S. Goldstein, Graham & James, LLP, of New York, New York, for amici curiae AgrEvo USA Company and Nor-Am Chemical Company. Gilbert Lee Sandler, Sandler, Travis & Rosenberg, P.A., of Miami, Florida, for amicus curiae Oshkosh B'Gosh, Inc. James S. O'Kelly, Barnes, Richardson & Colburn, of New York, New York, for amicus curiae Firmenich, Inc.; of counsel was Christopher E. Pey. Mark Stuart Zolno, Katten, Muchin & Zavis, of Chicago, Illinois, for amicus curiae Perseco Asia-Pacific, L.P.

Leslie Alan Glick, Porter, Wright, Morris & Arthur, of Washington, DC, for amici curiae CombiBloc, Inc., Carter-Wallace, Inc., Allied Mineral, Inc., Techneglas, Inc., and Diehl, Inc.

Jerry P. Wiskin, Simmons & Wiskin, of New York, New York, for amicus curiae Cam USA, Inc.

Appealed from: U.S. Court of International Trade

Judge Jane A. Restani

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1590

INTERNATIONAL BUSINESS MACHINES CORPORATION

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

DECIDED: January 19, 2000

Before PLAGER, CLEVENGER, and RADER, Circuit Judges.

PLAGER, Circuit Judge.

The United States ("the Government") appeals a judgment of the United States Court of International Trade, which awarded interest on refunds of the Harbor Maintenance Tax ("HMT"). The Supreme Court had earlier held that the HMT, as applied to exports, violates the Export Clause of the United States Constitution, and cannot be lawfully collected.[1] This case was filed to test whether the Government is obligated by law to pay interest on these refunds.

The Court of International Trade held that appellee may recover interest on refunds of HMT payments resulting from the Supreme Court's decision.[2] The trial court adjudged that

---

[1] United States v. United States Shoe Corp., 523 U.S. 360 (1998).

[2] IBM v. United States, No. 94-10-00625, 1998 WL 325156 (Ct. Int'l Trade June 17, 1998).

28 U.S.C. § 2411, which provides for post-judgment interest on tax refunds, applies.[3] We conclude that neither § 2411 nor any other statutory provision provides the necessary authorization for an award of interest to appellee on its HMT refunds. The judgment of the trial court is reversed.

BACKGROUND

The HMT, enacted by Congress as part of the Water Resources Development Act of 1986, 26 U.S.C. § 4461-62 (1994), is an ad valorem tax imposed on shipments of commercial cargo which pass through the country's ports. Several thousand exporters challenged the constitutionality of the HMT as applied to exporters. In a test case, a three-judge panel of the Court of International Trade held that the HMT violates the Export Clause of the United States Constitution. See United States Shoe Corp. v. United States, 907 F. Supp. 408 (1995). This decision was affirmed by a five-judge panel of this court, see United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997), which decision was affirmed by the Supreme Court, see United States v. United States Shoe Corp., 523 U.S. 360 (1998).

In the course of the initial litigation before the Court of International Trade, that court issued an Order declaring that the plaintiff was entitled to a refund "together with interest and costs as provided by law." United States Shoe Corp. v. United States, 924 F.Supp. 1191, 1191 (Ct. Int'l Trade 1995). Subsequently the court determined that the question of interest on the refund judgment "is not a matter without controversy and it cannot be resolved as a simple clerical matter." U.S. Shoe, 20 Ct. Int'l Trade 206, 207 (1996). The Court of International Trade called for briefing on the issue of whether the exporters may recover interest. However, before the court issued its decision on the question of plaintiff's entitlement to interest, the Government filed a notice of

---

[3] All references to the United States Code are to the 1994 edition unless otherwise indicated.

appeal from the court's earlier decision on the constitutional issue. Thus, the interest issue was not addressed during the appellate proceedings that followed.

While the appeal of the constitutional issue was proceeding, the Court of International Trade decided the question of whether the exporters were entitled to interest on their refunds. The court acknowledged that the United States is immune from paying interest absent express congressional consent, citing Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). See U.S. Shoe, 20 Ct. Int'l Trade at 207. The court found the necessary express authorization with regard to HMT refunds in 28 U.S.C. § 2411, which provides that "[i]n any judgment of any court rendered (. . . against the United States . . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment . . . ." U.S. Shoe, 20 Ct. Int'l Trade at 207-08.

After the Supreme Court affirmed the unconstitutionality of the HMT as applied to exports, the Court of International Trade designated this case as a companion test case to U.S. Shoe to give the Government the opportunity to appeal the award of interest. See IBM, 1998 WL 325156, at *1. The Court of International Trade deemed filed in this case the briefs concerning the issue of interest filed in the U.S. Shoe proceedings as well as its 1996 U.S. Shoe opinion awarding interest. See id. This appeal followed.

DISCUSSION

The issue of whether Congress has expressly authorized interest on HMT refunds is one of statutory interpretation, a question of law that we review independently and without deference to the trial court. See Medline Indus., Inc. v. United States, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (questions of law subject to full and independent review). The oft-repeated general principle is that the United States is immune to claims for interest unless Congress has waived immunity by expressly consenting to an award of interest. See Shaw,

478 U.S. at 314. Congressional consent must be unambiguous. See id. at 318.

The HMT statutory provisions are relatively brief, and are codified in two sections, numbered 4461 and 4462, as "Subchapter A—Harbor Maintenance Tax" in Chapter 36-Certain Other Excise Taxes, as part of Title 26-Internal Revenue Code. Section 4461 imposes the tax, and section 4462 provides definitions and special rules. Nothing in Subchapter A expressly addresses the question of whether in a refund of taxes paid thereunder, the payer is entitled to interest on the refund. The only provisions of Subchapter A that bear on the question are found in two paragraphs in subsection 4462(f), entitled "Extension of provisions of law applicable to customs duty."

Paragraph (1) of subsection (f) states: "Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter . . . ." Paragraph (3) states: "The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." (Subtitle F of Title 26 deals with the procedure and administration of the internal revenue system.)

It appears abundantly clear from these provisions that, even though the HMT is codified as an excise tax and is part of the Internal Revenue Code ("IRC"), Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty, and not a tax under the IRC.

Because the statutory provisions which established the HMT do not explicitly authorize interest payments on refunds of the tax, if Congress authorized such payments the authorizing statute must be found elsewhere. And if such a statute is found, we must determine whether Congress by the provisions of subsection (f) quoted above has precluded its application to an HMT refund. We have been urged to look at

several possible sources for the authorization; we shall examine each in turn.

1.

Subtitle F of Title 26, the Internal Revenue Code, in § 6611(a), states that "[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." This provision of the Code cannot apply because the HMT statute, § 4462(f)(3), specifically exempts the HMT from all provisions in subtitle F of Title 26: "[t]he [HMT tax] shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Thus, any Congressional authorization of interest payments on HMT refunds must be found outside of subtitle F.

The Court of International Trade found the necessary express authorization for interest payments in another Title of the United States Code, namely Title 28, which is entitled "Judiciary and Judicial Procedure." 28 U.S.C. § 2411 provides, in relevant part, that "[i]n any judgment of any court rendered (. . . against the United States . . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment . . . ."

In its analysis of § 2411, the Court of International Trade first determined that the HMT is an internal revenue tax within the meaning of § 2411. See U.S. Shoe, 20 Ct. Int'l Trade at 208. The court then considered whether the two paragraphs of the HMT statute quoted above precluded application of § 2411 to HMT refunds. The court concluded that the HMT refund process would not constitute either "administration" or "enforcement" of the HMT, and that the HMT statute did not exempt HMT refunds from application of § 2411. See U.S. Shoe, 20 Ct. Int'l Trade at 208-09.

For purposes of analysis, we accept the argument of appellee and the holding of the Court of International Trade that payment of the HMT by exporters is an "internal revenue tax" within the meaning of § 2411. Because Congress codified the HMT as part of Title 26 of the United States Code, entitled "Internal Revenue Code," we may reasonably conclude that Congress considered the HMT to be an internal revenue tax. Furthermore, while it may be true that the constitutionality of the HMT was challenged because the HMT taxed goods exported out of the United States, the HMT is clearly derived from internal sources—the U.S. exporter—rather than external sources—the foreign recipient; HMT revenues were collected in the United States from domestic companies based on their use of ports and harbors in this country. Thus both the structure and the content of the HMT point toward it being an internal revenue tax, and thus entitled on refund to the interest award provided under § 2411.

Furthermore, we accept appellee's contention that the language of § 2411 is broad enough, and has been so construed, as to cover the case before us. The question, then, is whether the express provisions of the HMT statute preclude application of § 2411 to refunds of the tax. As previously noted, the HMT statute in subsection (f) of § 4462 directs that "the [HMT] shall not be treated as a tax for purposes of subtitle F *or any other provision of law relating to the administration and enforcement of internal revenue taxes*." 26 U.S.C. § 4462(f)(3) (emphasis added). If the refund process for the unconstitutionally-levied HMT is not related to the "administration and enforcement" of an internal revenue tax, then § 2411 of Title 28 would appear to be ample authorization for interest to be paid on the refund. If, however, the refund process for this internal revenue tax relates to its administration and enforcement, the plain language of the HMT statute would bar the use of § 2411 as a statutory basis for an award of interest on HMT refunds.

This is a question of statutory interpretation. We begin with the language of the statute itself. If that language is clear

and unambiguous, then it controls, and we need not—indeed we may not—go further. See Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989))); Muwwakkil v. Office of Personnel Management, 18 F.3d 921, 924 (Fed. Cir. 1994) ("When statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails."). To determine whether the statutory language is plain and unambiguous, we look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson, 519 U.S. at 341.

Because the HMT statute does not define "administration and enforcement," we assume that the terms have their ordinary meaning, for which we may consult a dictionary. See Best Power Tech. Sales Corp. v. Austin, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation . . . that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary.") (citations omitted). Black's Law Dictionary defines "administer" as "[t]o manage or conduct." Black's Law Dictionary 44 (6th ed. 1990). "Enforce" is defined as "[t]o put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to." Id. at 528.

Applying these definition to the HMT statute, we read "administration and enforcement of internal revenue taxes" broadly to encompass not only management of the tax system, including the assessment and collection of tax payments and issuance of refunds and interest on those refunds by the agency responsible, but also enforcement of the tax laws, including the obtaining and enforcement of judgments against

both taxpayers and the United States. Nothing in the language of the statute limits "administration and enforcement" to the narrow interpretation applied by the Court of International Trade, i.e., "matters of routine administration and enforcement by an agency." U.S. Shoe, 20 Ct. Int'l Trade at 208.

Examination of the phrase "administration and enforcement" in the context of 26 U.S.C. § 4462(f)(3) supports this broader interpretation. Again, that paragraph of the statute exempts the HMT from "subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Subtitle F of the Internal Revenue Code is entitled "Procedure and Administration." In addition to chapters addressing agency responsibilities such as "Assessment" (chapter 63), "Collection" (chapter 64), and "Abatements, credits, and refunds" (chapter 65), subtitle F includes a chapter on "Judicial proceedings" (chapter 76). That chapter includes provisions regarding civil actions by the United States (subchapter A), proceedings by taxpayers and third parties (subchapter B), the Tax Court (subchapter C), and court review of Tax Court decisions (subchapter D).

A fair reading of the phrase "subtitle F or any other provision of law" as used by Congress in the HMT statute would thus include both the administrative and judicial processes as activities that relate to the "administration and enforcement" of taxes. Furthermore, interest on a tax refund would seem to be expressly included in those activities, since subtitle F itself contains a provision for interest on tax refunds, 26 U.S.C. § 6611(a). Accordingly, we are forced to conclude that Congress intended the phrase "administration and enforcement" to encompass not only agency action, but also judicial enforcement of the tax laws, including a judicial award of interest on tax refunds.

This interpretation is consistent with the other paragraph of subsection (f) of the HMT statute, § 4462(f)(1), quoted above, which provides that "all administrative and

enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] as if such tax were a customs duty." The Tariff Act of 1930, codified in the United States Code in Chapter 4 of Title 19, entitled "Customs Duties," provides for the administration and enforcement of customs duties in Subtitle III, entitled "Administrative Provisions." As discussed below, that subtitle includes a provision for interest on refunds of customs duties. See 19 U.S.C. § 1505.

Section 4462(f)(3) is complementary to § 4462(f)(1), i.e., the administration and enforcement provisions relating to tax laws cannot apply to the HMT, see § 4462(f)(3), because the administration and enforcement provisions of the customs laws do apply to the HMT, see § 4462(f)(1). Accordingly, because an interest provision such as 19 U.S.C. § 1505(c) is an administrative and enforcement provision of the customs laws, the section of Title 28, § 2411, which provides for interest on tax refunds, is a "provision of law relating to the administration and enforcement of internal revenue taxes" within the meaning of 26 U.S.C. § 4462(f)(3) and cannot apply to the HMT.

Although it is unnecessary to consider the legislative history because the statutory language is clear from the language itself and its context, we note that the legislative history does not contradict the plain meaning of the HMT statute. The Senate Finance Committee report, cited by the Court of International Trade, states that it is more appropriate for the Customs Service, rather than the Internal Revenue Service, to collect and administer the HMT because the Customs Service has a strong presence at ports of entry and experience at appraising merchandise. See S. Rep. No. 99-228, reprinted in 1986 U.S.C.C.A.N. 6705, 6714. In order to facilitate the administration of the HMT by Customs, the report explains, the statute provides that all administrative and enforcement provisions of the customs law and regulations apply to the HMT as if it were a customs duty. See id. at 6714-15.

Though nothing in the legislative history defines the phrase "administration and enforcement," and the report is silent on the issue of whether a provision for interest on refunds relates to administration and enforcement, the legislative history confirms that § 4462(f)(3) was enacted as a counterpart to § 4462(f)(1) so that the administrative and enforcement provisions of only the customs statutes, and not the tax laws, would apply to the HMT. See id. at 6715. As noted above, the administrative provisions of the customs laws include interest opinions. Because Congress did not specifically exclude interest provisions from "administrative and enforcement provisions" with respect to § 4462(f)(1), we must conclude that the interest provisions of the customs laws, and not the tax laws, apply to the HMT.

2.

Having concluded that the HMT is to be treated as a customs duty for administrative and enforcement purposes, we look to the customs statutes for an express authorization of interest. Two provisions, 28 U.S.C. § 2644 and 19 U.S.C. § 1505(c), were raised before the Court of International Trade and by amici on appeal. We agree with the Court of International Trade that these customs provisions do not provide for interest on HMT refunds on the facts of this case. See U.S. Shoe, 20 Ct. Int'l Trade at 208-09.

28 U.S.C. § 2644 permits a judicial award of interest upon a judgment in a civil action brought pursuant to 19 U.S.C. § 1515 to contest the denial of an administrative protest. Appellee, however, did not pursue a refund of HMT payments through a customs protest. Indeed, in the earlier test case, the Court of International Trade had jurisdiction over the constitutional challenge to the HMT under 28 U.S.C. § 1581(i), the residual judrisdiction provision, and not under 28 U.S.C. § 1581(a), the provision that gives the Court of International Trade jurisdiction over actions filed under 19 U.S.C. § 1515. See U.S. Shoe, 523 U.S. at 366. Because appellee did not file an administrative protest and did not

contest the denial of such a protest, appellee is not entitled to interest under 28 U.S.C. § 2644.

The customs laws also provide for pre-judgment interest on certain excess duties paid to Customs. Specifically, "[i]nterest on excess moneys deposited shall accrue . . . from the date the *importer of record* deposits estimated duties, fees and interest . . . to the date of *liquidation or reliquidation* of the applicable *entry* or reconciliation." 19 U.S.C. § 1505(c) (emphasis added); see also 19 U.S.C. § 1520(d) (1988) (repealed 1993) (authorizing interest "if a determination is made to reliquidate an entry"). On its face, the statute contemplates an entirely different factual scenario from the one before us. However, amici suggest that by substituting the exporter for the "importer of record," the HMT quarterly report for the "entry," and Customs' acceptance of the HMT payment for "liquidation," we can apply § 1505(c) to provide interest on HMT refunds. We are without power to rewrite a Congressional enactment to make it fit a case for which it was clearly not intended, no matter how compelling the case, particularly in light of the Supreme Court's mandate that Congress must expressly consent to an award of interest. See Shaw, 478 U.S. at 314. Accordingly, § 1505(c) does not authorize interest on HMT refunds.

In sum, we are bound by the rule that the United States is liable for interest only if Congress has waived sovereign immunity by expressly consenting to an award of interest. Section 4462(f) provides that the HMT is to be treated as a customs duty, and not as a tax, for purposes of statutory provisions relating to administration and enforcement. Because § 2411, the provision on which appellee and the trial court relied, is a provision of law relating to the administration and enforcement of taxes, the HMT statute precludes the application of § 2411 to provide interest on refunds of the HMT. Furthermore, the statutory provisions of the customs laws dealing with interest on refunds do not entitle this appellee, on these facts, to interest on HMT refunds.

Congress has waived sovereign immunity in both the tax code and the customs laws to permit interest to be paid on certain refunds to allow for the time value of money when the Government has had the use for a period of time of money to which it is not lawfully entitled. Congress has considered this to be only fair and proper. In the case before us, appellee makes a case for equal treatment. After thorough consideration, however, we are unable to find in the existing statutory framework, nor has any been cited to us, the necessary Congressional purpose to provide for interest on these particular refunds under the HMT. If relief for these taxpayers is to be granted, Congress must grant it.

CONCLUSION

The judgment of the Court of International Trade must be, and is,

REVERSED.

COSTS

Each party shall bear its own costs.

UNITED STATES SHOE CORP.,

Plaintiff,

v.

The UNITED STATES,

Defendant.

Slip op. 96-32.
Court No. 94-11-00668.

United States Court of International Trade.

February 7, 1996.

Seigel, Mandell & Davidson, P.C., Brian S. Goldstein, Paul A. Horowitz and Laurence M. Friedman, New York City, for plaintiff.

Frank W. Hunger, Washington, DC, Assistant Attorney General, David M. Cohen, Director, Jeanne E. Davidson, Washington, DC, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Elizabeth Newsom, Richard McManus, Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

Baker & McKenzie, William D. Outman, II, Washington, DC and Kevin M. O'Brien, for Brown-Forman Corp., Fisher Controls, Intern. Co., Hewlett-Packard Corp., Intern. Business Machines Corp., Minnesota Min. & Mfg. Corp. and Seagate Technology Corp., amici curiae.

Barnes, Richardson & Colburn, James S. O'Kelly, New York City, Robert E. Burke, Matthew T. McGrath, Washington DC, Lawrence M. Friedman, Christopher E. Pey, New York City, and Cindy H. Chan, for Firmenich, Inc., Amoco Chemical Co. and Polaroid Corp., amici curiae.

Coudert Brothers, Steven H. Becker, Charles H. Critchlow and Claire R. Kelly, New York City, for Texaco Refining and Marketing, Inc., American Natural Soda Ash Corp., United Export Corp., ABRO Industries, GSI Exim America, Inc., Vitol S.A., Inc., M-C Intern. d/b/a McLane Group Intern. L.P., Bridgestone/Firestone Inc., Dorland Management, Inc., FAI Trading Co., Star Enterprises, Inc., Vista Chemical Co., Champion Intern. Corp., Champion Export Corp. and ISP Technologies, Inc., amici curiae.

Crowell & Moring, Barry E. Cohen, Washington, DC, for E.I. du Pont de Nemours & Co., amicus curiae.

Dorsey & Whitney P.L.L.P., John B. Rehm and Munford Page Hall, II, Washington, DC, for New Holland North America, Inc., amicus curiae.

Grunfeld, Desiderio, Lebowitz & Silverman, L.L.P., Steven P. Florsheim and Erik D. Smithweiss, New York City, for Boise Cascade Corporation, Etonic Inc., Germain-Webber Lumber Co., Inc., International Veneer Co., Mondial International Corp. and The Heil Co., amici curiae.

LeBoeuf, Lamb, Greene & Macrae, L.L.P., Melvin S. Schwechter, Washington, DC, John C. Cleary and Wendy L. Klunk, Pittsburgh, PA, for Aluminum Company of America, Alcoa International, S.A., Alcoa Inter-America, Inc., Alcoa Memory Products, Inc., H-C Industries, Inc. and The Stolle Corporation, amici curiae.

Irving A. Mandel, Miami Beach, FL, Thomas J. Kovarcik, New York City, Steven R. Sosnov, Norristown, PA, and Jeffrey H. Pfeffer, of counsel, Plainview, NY, for Allied Textiles Sales Company, Sheftel International Inc., Fab-Tech Inc., Sirex, Ltd., Debois Textiles, Inc., Capital Textiles, Inc., M. Kopepel Company, Dumont Export Corporation, United Overseas Corporation, Regent Corporation and Muran Universal, Inc., amici curiae.

McKenna & Cuneo, Peter Buck Feller, Joseph F. Dennin, Michael K. Tomenga, Lawrence J. Bogard and Brian

O'Shea, Washington, DC, for Swisher International, Inc., amicus curiae.

Neville, Peterson & Williams (John M. Peterson, George W. Thompson and James A. Marino, for Aris-Isotoner, Inc., Berwick Industries, Inc., Chevron Chemical Company, Inc., Chevron Chemical International Sales, Inc., Chevron International Oil Company, Chevron Overseas Petroleum, Inc., Chevron U.S.A., Inc., Fieldston Clothes, Inc., General Glass International Corporation, Microsoft Corporation, The Pillsbury Company, Rhone-Poulenc, Inc., Uniroyal Chemical Company, Inc., Xerox Corporation, Xerox Corporation, Americas Operations Division, Xerox Corporation, Southern California Manufacturing Operations Division and Xerox International Partners, amici curiae.

Rode & Oualey, Patrick D. Gill and John S. Rode, New York City, of counsel, for General Chemical Corporation, Sumitomo Corporation of America, Newell International, Siemens Energy & Automation, Inc., Siemens Power Corp., Siemens Medical Systems, Inc., Siemens Transportation Systems, Inc., Siemens Solar Industries and Unisys Corporation, amici curiae.

MEMORANDUM OPNION

RESTANI, Judge:

*1 The judgment in this action awarded plaintiff $8,281.87, "together with interest and costs as provided by law." U.S. Shoe Corp. v. United States, Slip Op. 95-197 (Dec. 4, 1995); see also U.S. Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995). It has come to the court's attention that "interest" is not a matter without controversy and it cannot be resolved as a simple clerical matter. Since the briefing of this issue, however, notice of appeal has been filed and the court lacks jurisdiction to alter the judgment.

Because the issue has been fully briefed under the captioned case by the attorneys involved in the numerous

cases stayed hereunder, because the issue is relevant to the lifting of stays as to such cases, and for administrative convenience, the court will address this matter under this caption. At the outset, the court notes that in the absence of express congressional consent, the United States is immune from an interest award. Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). Interest is, however, available to claimants when Congress permits such interest to be awarded by statute. Id. at 316.

Plaintiff and amici contend that interest on plaintiff's payments of the Harbor Maintenance Tax ("HMT") is expressly provided for by 28 U.S.C. § 2411 (1988). That statute provides, in relevant part:

> In any judgment of any court rendered (whether against the United States, . . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, ...

The Supreme Court has recognized that section 2411 constitutes an express waiver of sovereign immunity with respect to interest and expressly authorizes prejudgment and postjudgment interest payable by the United States in tax-refund cases. Shaw, 478 U.S. at 318 n.6. Furthermore, section 2411 applies when taxes are improperly and illegally collected. Sterns v. Clauson, 122 F. Supp. 795, 797 (D. Me. 1954).

This court has held that the HMT on exports constitutes a tax prohibited by the Export Clause of the Constitution. U.S.

Shoe Corp., 907 F. Supp. at 418. The HMT is a tax provided for by the Internal Revenue Code. See 26 U.S.C. §§ 4461-62 (1994).

Congress, however, has expressly provided in the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461-62, that the HMT is to be treated as a customs duty for the purposes of administration and enforcement as well as jurisdiction. See id. § 4462(f)(1)-(2). Additionally, section 4462(f)(3), Title 26, United States Code, provides, in relevant part, that "[t]he tax imposed by this subchapter shall not be treated as a tax for the purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Id. § 4462(f)(3) (emphasis added).

*2 The court finds, however, that any monetary relief granted by the court would not constitute either "administration" or "enforcement" of the HMT as envisioned by 26 U.S.C. § 4462(f)(3). That section is limited to matters of routine administration and enforcement by an agency. The legislative history of the HMT statute explains that the underlying purpose of both section 4462(f)(1) and (3) was to confirm which agency was to have responsibility for collecting and processing HMT payments. See S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), reprinted in 1986 U.S.C.C.A.N. 6705, 6714-15 (stating Customs' strong presence at ports of entry and experience at appraising imported merchandise made it appropriate for Customs, rather than Internal Revenue Service to collect, administer, and enforce HMT). The court also notes that while Congress expressly sought to preclude application of the administrative provisions of the Internal Revenue Code in the collection and processing of the HMT, section 2411 is within Title 28 of the United States Code, which governs the judiciary and judicial procedure, rather than an administrative provision within Title 26 (the Internal Revenue Code).

Furthermore, a money judgment for customs duties protested by ordinary administrative and judicial procedures

would include interest calculated in a manner similar to that provided for in 28 U.S.C. § 2411. See 19 U.S.C. § 1520(d) (1988); 19 U.S.C. § 1505(c) (1994); 28 U.S.C. § 2664 (1988). Defendant correctly maintains that these statutory provisions, however, do not apply to payments of the HMT where no decision by Customs has been made or no liquidation has occurred. Defendant further maintains that as section 2411 requires the Commissioner of Internal Revenue to take an active role in tendering and setting the date of payment, Congress could not have intended section 2411 to apply to payments of the HMT. The court notes that the issue of how payments of any type are to be made is one of administration. Under the statutory scheme, Customs, not the Commissioner, is required to collect payments of the HMT. The court finds that requiring the Commissioner, rather than Customs, to tender and set the date of payment under a strict literal reading of section 2411 or obviating the requirement of interest because Customs administers the statute but did not provide a decision or liquidation, would be illogical and contrary to legislative intent. See Witco Chem. Corp. v. United States, 742 F.2d 615, 619 (Fed. Cir. 1984) ("[A]n absurd construction of a statutory provision should be avoided."); see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1983) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Reading the applicable statutes in pari materia and finding defendant's interpretation of 28 U.S.C. § 2411 and 26 U.S.C. § 4462 as read together unreasonable, the court must construe the statutes, keeping in mind that "[a]ll statutes must be construed in light of their purpose." Wassenaar v. Office of Personnel Mgmt., 21 F.3d 1090, 1096 (Fed. Cir. 1994) (quoting Best Power Technology Sales Corp. v. Austin, 984 F.2d 1172, 1175 (Fed. Cir. 1993)); see also Marlowe v. Bottarelli, 938 F.2d 807, 813 (1991) (stating rule that "whenever possible courts construe statutes and regulations in

pari materia"). The court finds that in actions brought pursuant to 28 U.S.C. § 1581(i) (1988 & Supp. V 1993), Congress intended to provide interest on payments of the HMT for exports pursuant to section 2411, but that related administrative actions would be performed by Customs.

END OF DOCUMENT.

SUPREME COURT OF THE UNITED STATES

No. 97-372

UNITED STATES, PETITIONER *v.* UNITED STATES SHOE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[March 31, 1998]

JUSTICE GINSBURG delivered the opinion of the Court.

The Export Clause of the Constitution states: "No Tax or Duty shall be laid on Articles exported from any State." U. S. Const., Art. I, §9, cl. 5. We held in *United States* v. *International Business Machines Corp.*, 517 U.S. 843 (1996) *(IBM)*, that the Export Clause categorically bars Congress from imposing any tax on exports. The Clause, however, does not rule out a "user fee," provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits. See *Pace* v. *Burgess*, 92 U.S. 372, 375-376 (l876). This case presents the question whether the Harbor Maintenance Tax (HMT), 26 U.S.C. §4461(a), as applied to goods loaded at United States ports for export, is an impermissible tax on exports or, instead, a legitimate user fee. We hold, in accord with the Federal Circuit, that the tax which is imposed on an ad valorem basis, is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee.

I

The HMT, enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. §§4461-4462, imposes a uniform charge on shipments of commercial cargo through

the Nation's ports. The charge is currently set at 0.125 percent of the cargo's value. Exporters, importers, and domestic shippers are liable for the HMT, §4461(c)(1), which is imposed at the time of loading for exports and unloading for other shipments, §4461(c)(2). The HMT is collected by the Customs Service and deposited in the Harbor Maintenance Trust Fund (Fund). Congress may appropriate amounts from the Fund to pay for harbor maintenance and development projects, including costs associated with the St. Lawrence Seaway, or related expenses. §9505.

Respondent United States Shoe Corporation (U.S. Shoe) paid the HMT for articles the company exported during the period April to June 1994 and then filed a protest with the Customs Service alleging the unconstitutionality of the toll to the extent it applies to exports. The Customs Service responded with a form letter stating that the HMT is a statutorily mandated fee assessment on port users, not an unconstitutional tax on exports. On November 3, 1994, U.S. Shoe brought this action against the Government in the Court of International Trade (CIT). The company sought a refund on the ground that the HMT is unconstitutional as applied to exports.

Sitting as a three-judge court, the CIT held that its jurisdiction was properly invoked under 28 U.S.C. §1581(i); on the merits, the CIT agreed with U.S. Shoe that the HMT qualifies as a tax. 907 F. Supp. 408 (1995). Rejecting the Government's characterization of the HMT as a user fee rather than a tax, the CIT reasoned: "The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo . . . . Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported." *Id.*, at 418. Relying on the Export Clause, the CIT entered summary judgment for U.S. Shoe.

The Court of Appeals for the Federal Circuit, sitting as a five-judge panel, affirmed. 114 F. 3d 1564 (1997). On auxiliary questions, the Federal Circuit upheld the CIT's

exercise of jurisdiction under §1581(i) and agreed with the lower court that the HMT applied to goods in export transit.[1] Concluding that the HMT is not based on a fair approximation of port use, the Federal Circuit also agreed that the HMT imposes a tax, not a user fee. In making this determination, the Court of Appeals emphasized that the HMT does not depend on the amount or manner of port use, but is determined solely by the value of cargo. Judge Mayer dissented; in his view, Congress properly designed the HMT as a user fee, a toll on shippers that supplies funds not for the general support of government, but exclusively for the facilitation of commercial navigation.

Numerous cases challenging the constitutionality of the HMT as applied to exports are currently pending in the Court of International Trade and the Court of Federal Claims.[2] We granted certiorari, 522 U. S. ___ (1997), to review the Federal Circuit's determination that the HMT violates the Export Clause.

II

As an initial matter, we conclude that the CIT properly entertained jurisdiction in this case. The complaint alleged exclusive original jurisdiction in that tribunal under 28 U.S.C. §1581(a) or, alternatively, §1581(i). App. 26. We agree with the CIT and the Federal Circuit that §1581(i) is the applicable jurisdictional prescription. The key directive is stated in 26 U.S.C. §4462(f)(2), which instructs that for jurisdictional purposes, the HMT "shall be treated as if such tax were a customs duty."

---

[1] The Government does not here challenge the determination that the HMT applies to goods in export transit.

[2] According to the Government, some 4,000 cases raising this claim are currently stayed in the CIT, with more than 100 additional cases stayed in the Court of Federal Claims. See Brief for United States 4.

Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the Court of International Trade in "any civil action commenced to contest the [Customs Service's] denial of a protest." A protest, as indicated in 19 U.S.C. §1514, is an essential prerequisite when one challenges an actual Customs decision. As to the HMT, however, the Federal Circuit correctly noted that protests are not pivotal, for Customs "performs no active role," it undertakes "no analysis [or adjudication]," "issues no directives," "imposes no liabilities"; instead, Customs "merely passively collects" HMT payments. 114 F. 3d, at 1569.

Section 1581(i) describes the Court of International Trade's residual jurisdiction over

> "any civil action commenced against the United States . . . that arises out of any law of the United States providing for —
>
> "(1) revenue from imports or tonnage;
>
> . . . . .
>
> "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection. . . ."

This dispute, as the Federal Circuit stated, "involve[s] the 'administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." 114 F. 3d, at 1571. True, §1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in §4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§]1581(i)(1)." 907 F. Supp., at

421. Accordingly, CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with §1581(i)(4).[3]

III

Two Terms ago, in *IBM*, this Court considered the question whether a tax on insurance premiums paid to protect exports against loss violated the Export Clause. Distinguishing case law developed under the Commerce Clause, 517 U.S., at 850-852, and the Import-Export Clause, *id.*, at 857-861, the Court held that the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit. Before this Court's decision in *IBM*, the Government argued that the HMT, even if characterized as a "tax" rather than a "user fee," should survive constitutional review "because it applies without discrimination to exports, imports and domestic commerce alike." Reply Brief for United States 9, n.2. Recognizing that *IBM* "rejected an indistinguishable contention," the Government now asserts only that HMT is "'a permissible user fee,'" *ibid.*, a toll within the tolerance of Export Clause precedent. Adhering to the Court's reasoning in *IBM*, we reject the Government's current position.

The HMT bears the indicia of a tax. Congress expressly described it as "a *tax* on any port use," 26 U. S. C. §4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code. In like vein, Congress provided that, for administrative, enforcement, and jurisdictional purposes,

---

[3] Because we determine that the Court of International Trade has exclusive jurisdiction over challenges to the HMT under §1581(i)(4), it follows that the Court of Federal Claims lacks jurisdiction over the challenges to the HMT currently pending there. See 28 U.S.C. §1491(b). The plaintiffs in these challenges may invoke §1631, which authorizes inter-court transfers, when "in the interest of justice," to cure want of jurisdiction. See also §610 (as used in Title 28, the term "court" includes the Court of Federal Claims and the CIT).

the HMT should be treated "as if [it] were a customs duty." §§4462(f)(1),(2). However, "we must regard things rather than names," *Pace* v. *Burgess*, 92 U.S., at 376, in determining whether an imposition on exports ranks as a tax. The crucial question is whether the HMT is a tax on exports in operation as well as nomenclature or whether, despite the label Congress has put on it, the exaction is instead a bona fide user fee.

In arguing that the HMT constitutes a user fee, the Government relies on our decisions in *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), *Massachusetts* v. *United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972). In those cases, this Court upheld flat and ad valorem charges as valid user fees. See *United States* v. *Sperry Corp.*, 493 U.S., at 62 (1½ percent ad valorem fee applied to awards certified by the Iran-United States Claims Tribunal qualifies as a user fee and is not so excessive as to violate the Takings Clause); *Massachusetts* v. *United States*, 435 U.S., at 463-467 (flat federal registration fee imposed annually on all civil aircraft meets genuine user fee standards and, as applied to state-owned aircraft, does not dishonor State's immunity from federal taxation); *Evansville-Vanderburgh Airport Authority*, 405 U.S., at 717-721 (flat charge for each passenger enplaning, levied for the maintenance of State's airport facilities, does not run afoul of the dormant Commerce Clause). Those decisions involved constitutional provisions other than the Export Clause, however, and thus do not govern here.

IBM plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority. The Court there emphasized that the "text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports." 517 U.S., at 852; see also *id.*, at 861 ("[T]he Framers sought to alleviate . . . concerns [that Northern States would tax exports to the

disadvantage of Southern States] by completely denying to Congress the power to tax exports at all."). Accordingly, the Court reasoned in *IBM*, "[o]ur decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid." *Id.*, at 851; see also *id.*, at 857 ("We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence . . . . [M]eaningful textual differences exist [between the two Clauses] and should not be overlooked."). In *Sperry*, moreover, we noted that the Takings Clause imposes fewer constraints on user fees than does the dormant Commerce Clause. See 493 U. S., at 61, n. 7 (analysis under Takings Clause is less "exacting" than under the dormant Commerce Clause). *A fortiori*, therefore, the Takings Clause is less restrictive than the Export Clause.

The guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context remains our time-tested decision in *Pace*. *Pace* involved a federal excise tax on tobacco. Congress provided that the tax would not apply to tobacco intended for export. To prevent fraud, however, Congress required that tobacco the manufacturer planned to export carry a stamp indicating that intention. Each stamp cost 25 cents (later 10 cents) per package of tobacco. Congress did not limit the quantity or value of the tobacco packaged for export or the size of the stamped package; [t]hese were unlimited, except by the description of the exporter or the convenience of handling." 92 U.S., at 375.

The Court upheld the charge, concluding that it was "in no sense a duty on exportation," but rather "compensation given for services [in fact] rendered." *Ibid.* In so ruling, the Court emphasized two characteristics of the charge: It "bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed"; and the fee was not excessive, taking into account the cost of arrangements needed both "to give to the exporter the benefit of exemption

from taxation, and . . . to secure . . . against the perpetration of fraud." *Ibid.*

Pace establishes that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the stamp charge in *Pace,* the HMT is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter. As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging. See 114 F.3d, at 1572.

In sum, if we are "to guard against . . . the imposition of a [tax] under the pretext of fixing a fee," *Pace* v. *Burgess,* 92 U.S., at 376, and resist erosion of the Court's decision in *IBM,* we must hold that the HMT violates the Export Clause as applied to exports. This does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance.

It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit is

Affirmed.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1590

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

FILED
U.S. COURT OF APPEALS FOR THE
FEDERAL CIRCUIT
JUNE 13, 2000

ORDER

UPON CONSIDERATION of the appellee's motion to stay the mandate and amend the opinion and judgment, it is

ORDERED that the motion is DENIED. An errata sheet has been issued.

June 13, 2000

FOR THE COURT,

/s/_____
JAN HORBALY, CLERK

c: William D. Outman, II, Esq.
Jeffrey A. Belkin, Esq.

Note: Pursuant To Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ERRATA

JUNE 9, 2000

Appeal No. 98-1590 (International Business Machines Corporation v. United States)

Precedential opinion

DECIDED: January 19, 2000

Please make the following changes:

At page 14, under CONCLUSION, replace "The judgment of the Court of International Trade" with – The portion of the judgment of the Court of International Trade ordering interest pursuant to 28 U.S.C. § 2411 as owing on the principal amount adjudged--.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1590

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

JUDGMENT

ON APPEAL from the COURT OF INTERNATIONAL TRADE

in CASE NO(S). 94-10-00625

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: REVERSED

DATED Jan. 19, 2000
ISSUED AS A MANDATE:
JUNE 13, 2000

ENTERED BY ORDER OF THE COURT
/s/
Jan Horbaly, Clerk

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY 31, 2000
JAN HORBALY
CLERK

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT*, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 7, 2000.

For the COURT,
/s/
Jan Horbaly
Clerk

Dated: May 31, 2000

cc: Jeffrey A Belkin, Esq.
William D. Outman, II, Esq.
Steven P. Florsheim, Esq.
Leslie A. Glick, Esq.
Brian S. Goldstein, Esq.
Munford P. Hall, II, Esq.
James S. O'Kelly, Esq.
Melvin S. Schwechter, Esq.
Jerry P. Wiskin, Esq.
Barry E. Cohen, Esq.
Mark S. Zolno, Esq.
Thomas J. Kovarcik, Esq.
Steven H. Becker, Esq.
Peter J. Baskin, Esq.

IBM V US, 98-1590
(CIT - 94-10-00625)

* Two amici curiae briefs and the Appellant's supplemental response were also filed.

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

INTERNATIONAL BUSINESS MACHINES CORP.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

JUDGMENT

WHEREAS the parties consent to entry of judgment with interest in this case for the purpose of permitting the Government an opportunity to appeal the award of interest, it is hereby:

1. ORDERED that all briefs on the issue of interest and the opinion relating to the same, Slip Op. 96-032, filed in United States v. United States Shoe Co., Court No. 94-11-00668 be deemed filed herein.

2. ORDERED that a money judgment is awarded to plaintiff in the amount of $330,689.00, to be paid by the defendant to the plaintiff within 90 days of the date of this Judgment; and

3. ORDERED that interest pursuant to 28 U.S.C. § 2411 is owing on the aforesaid principal amount. The payment obligation as to interest is stayed until the time for appeal expires or the appeal is finally resolved.

/s/
Judge of the United States
Court of International Trade

Dated: New York, New York
This 17th day of June, 1998.

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 94-11-00668

UNITED STATES SHOE CORP. et al.,

Plaintiffs,

v.

THE UNITED STATES, et al.,

Defendants.

ORDER

A. Plaintiff herein is allowed until June 1, 1998 to submit an order settling the amount of interest and/or costs owing in this action.

B. By June 1, 1998, proceeding in general chronological order of filing, the United States shall select an appropriate case for the entry of judgment with interest, shall notify plaintiff in that case, and shall submit a proposed judgment form to the court by that date. Plaintiff may submit comments on the proposed judgment within three days thereafter. The briefs and opinion on the issue of interest filed in this case will be deemed filed in the newly selected case.

C. The stay of December 5, 1995 is lifted only as follows:

1. Amendments to unanswered complaints may be filed without motion to amend such complaints to correct errors or to add new claims.

2. Voluntary dismissals by plaintiffs may be filed.

3. Swisher v. United States, No. 95-03-00322 and Stone Container v. United States, No. 96-10-02366 may proceed. The United States is deemed to have answered the complaints denying the allegations thereof and raising the defense of the statute of limitations set forth in 28 U.S.C. § 2636(i) (1994). Plaintiffs will submit motions for summary judgment by June 18, 1998. Response time will run from this date. Amicus briefs on behalf of plaintiffs may be filed by June 26, 1998. A copy of this order shall be placed in the respective case files.

4. By June 19, 1998, the United States will file with the court a report on a random sampling of cases to determine what documentation results from queries to Customs' record-keeping system on particular cases.

5. The court will accept suggested plaintiffs' plans for general claim disposition, without legal argument. It is likely that a plan agreed upon by a number of plaintiffs will have greater impact. It is suggested that plaintiffs delay filing until the government's random sampling of documentation is completed so that the plan may respond to the results.

The court likely in early July will publish for comment a general claim disposition proposal.

/s/

Jane A. Restani
Judge

Dated: May 20, 1998
New York, New York

UNITED STATES SHOE CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

December 4, 1995, Decided

JUDGES: [*1] BEFORE: THE HONORABLE DOMINICK L. DiCARLO, CHIEF JUDGE, AND JANE A. RESTANI and R. KENTON MUSGRAVE, JUDGES.

OPINION BY: Dominick L. DiCarlo; Jane A. Restani; R. Kenton Musgrave

OPINION: ORDER

Upon consideration of defendant's motion for a stay of enforcement of judgment, it is hereby

ORDERED that defendant's motion is GRANTED; and it is further

ORDERED that execution of the money judgment awarded and the effect of the declaratory and injunctive relief granted are stayed until the later of (1) the expiration of the period for filing a notice of appeal; or (2) the conclusion of any appellate proceedings.

Dominick L. DiCarlo, Chief Judge

Jane A. Restani, Judge

R. Kenton Musgrave, Judge

Dated: New York, New York, This 4th day of December, 1995.

UNITED STATES SHOE CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

December 4, 1995, Decided

JUDGES: [*1] BEFORE: THE HONORABLE DOMINICK L. DiCARLO, CHIEF JUDGE, AND JANE A. RESTANI and R. KENTON MUSGRAVE, JUDGES.

OPINION BY: Dominick L. DiCarlo; Jane A. Restani; R. Kenton Musgrave

OPINION: JUDGMENT

Upon consideration of plaintiff's and defendant's motions for summary judgment, pursuant to Rule 56 of the Rules of this Court, the submissions of amici, the record, and other pertinent papers, it is hereby

ORDERED that plaintiff's motion for summary judgment is GRANTED; and it is further

ORDERED that defendant's motion for summary judgment is DENIED; and it is further

ORDERED that the Harbor Maintenance Tax imposed, pursuant to the Harbor Maintenance Revenue Act of 1986, Pub. L. No. 99-662, 100 Stat. 4266, on merchandise exported from the United States be, and hereby is, declared to be unconstitutional as a violation of Article I, Section 9, Clause 5 of the United States Constitution; and it is further

ORDERED that the United States Customs Service is hereby enjoined, as of the date of the entry of this Judgment, from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States; and it is further [*2]

ORDERED that a money judgment is awarded plaintiff in the amount of $ 8,281.87, together with interest and costs as provided by law.

Dominick L. DiCarlo, Chief Judge

Jane A. Restani, Judge

R. Kenton Musgrave, Judge

Dated: New York, New York, This 4th day of December, 1995.

U.S. Constitution

Amendment V

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 26 - INTERNAL REVENUE CODE

26 U.S.C. § 4462. Definitions and Special Rules

* * *

(3) Administrative provisions applicable to tax law not to apply

The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

28 U.S.C. § 2411. Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

ANNUAL REPORT TO CONGRESS ON THE STATUS OF THE HARBOR MAINTENANCE TRUST FUND FOR FISCAL YEAR 1998

EXECUTIVE SUMMARY

BACKGROUND

The Harbor Maintenance Tax (HMT) and Trust Fund (HMTF) were established by Title XIV of the Water Resources Development Act (WRDA) of 1986 (P.L. 99-662). The HMT is applied as a 0.125 percent *ad valorem* fee on the value of commercial cargo transported on vessels using Federally maintained navigation projects. HMT revenues collected by the U.S. Customs Service are transferred to the HMTF for disbursal upon appropriation by Congress. The HMT is used to recover 100 percent of the U.S. Army Corps of Engineers (USACE) eligible operations and maintenance (O&M) expenditures for commercial navigation, along with 100 percent of the O&M cost of the St. Lawrence Seaway by the St. Lawrence Seaway Development Corporation (SLSDC). Beginning in Fiscal Year 1998 the Federal shares of USACE dredged material disposal sites are also eligible for recovery from the HMTF in accord with Section 201 of WRDA 1996.

The dredging of navigable channels is the primary maintenance activity for which USACE expenditures are recovered from the HMTF. These Federally maintained navigation channels and associated facilities are vital to the waterborne transportation of American trade goods and essential to U.S. economic competitiveness within the global marketplace. Since 1987 the HMTF has supported the O&M of approximately 650 commercial navigation projects maintained by the Federal government. These projects facilitate safe, reliable, and cost-effective conveyance of waterborne vessels at approximately 300 coastal ports, 55 Great Lakes ports, 25 inland harbors, and the St. Lawrence Seaway. In 1997 U.S. waterborne commerce exceeded 2.33

billion tons, including 788 million tons of imports, 432 million tons of exports, and 1.11 billion tons of domestic trade.

To operate and maintain navigable waterways within the Nation's ports and harbors the USACE has removed an average of 240 million cubic yards of dredged material from Federal channels annually over the last ten years (Fiscal Years 1989-1998). Private contractors have accomplished almost 78 percent of this work. In FY 1998 navigation maintenance dredging totaled approximately 211 million cubic yards of material.

SUMMARY OF HMTF OPERATIONS IN FY 1998

Deposits into the HMTF during FY 1998 totaled $687,870,000, including $621,500,00 in HMF receipts and $66,370,000 in interest. Transfers from the HMTF totaled $511,093,000 in FY 1998. These transfers included: $496,900,000 to the USACE for the operation and maintenance (O&M) of Federal harbor projects; $11,000,000 to the SLSDC for the O&M of the U.S. portion of the St. Lawrence Seaway; $193,000 to the Department of Transportation for SLSDC rent payments; and, $3 million to the Department of Treasury, U.S. Customs Service for expenses incurred in the administration of the HMT.

Revenue deposited into the HMTF continue to exceed the transfers out of the fund, which has motivated, in part, lawsuits from domestic interests and complaints from the international community.

Tables ES-1 Displays a summary of actual HMTF revenues and transfers in FY's 1997 and 1998, and those projected for FY 1999. Before FY 1998 the USACE and Department of Treasury used prior year expenditures as the basis for transfers for the following fiscal year. However, beginning in FY 1998 a new procedure using current year budget estimates is being used as the basis for USACE HMTF transfers. Note that the FY 1998 budget estimate ($496,900,000) was

different than both prior year (FY 1997) expenditures ($578,336,000) and actual FY 1998 costs ($632,552,000).

The Energy and Water Development Appropriations Act for FY 1999 did not provide for the recovery of USACE O&M expenditures from the HMTF. This change will act to accelerate the growth of the HMTF surplus, with the unexpended balance at the close of FY 1999 now projected at $1.924 billion. The only USACE expenditures eligible for recovery from the HMTF for FY 1999 are $3.5 million for the Federal shares of the construction of dredged material disposal facilities (DMDFs). Highlights of other developments regarding the HMT and the HMTF in FY 1998 include:

Challenges to the Harbor Maintenance Tax

Supreme Court Ruling. On March 31, 1998, the U.S. Supreme Court affirmed a 1995 ruling by the U.S. Court of International Trade (CIT) on *U.S. Shoe Corp. v. The United States* that the HMT violates the export clause of the Constitution. The Court held that the ad valorem basis of the HMT does not provide the required connection between the services provided by the Government and the compensation it receives in order to qualify as a user fee. The Court noted, however, that the export clause does not prohibit a user fee, provided the fee is designed as fair compensation for the Government supplied services.

Halting of Collections on Exports. Subsequent to the Supreme Court's decision on *U.S. Shoe*, the CIT halted HMT collections on U.S. exports on April 25, 1998. HMT collection on exports exceeded $200 million in FY's 1995, 1996 and 1997. Approximately $95 million was collected from exporters in FY 1998 before collections were ended.

Revenue Shares. Collection of the HMT on imports, domestic and foreign trade zone cargo, and passengers continues, as required under the existing statutory regime. Historically, approximately 60 percent of the O&M costs for port and harbor projects were borne by importers, who market

their products to U.S. consumers, with exporters contributing about 30 percent. The remaining 10 percent was collected from domestic and foreign trade zone cargo an passengers subject to the tax. The *U.S. Shoe* decision struck down the HMT only as it applies to exports, and the U.S. Government is statutorily required to continue collecting the HMT from other cargo and passenger categories, including imports. Therefore, after *U.S. Shoe*, almost 85 percent of HMT collections are expected to be from imports, categories now representing just under 15 percent of HMT revenues.

Source of Refunds to Exporters. The Justice department ruled that the refunds to be paid to exporters would not be drawn out of the HMTF. Instead, the refunds will be paid out of the fund established by 31 U.S.C. 1322, which allows repayments of amounts which have erroneously been collected into the Treasury. The ultimate amount of the refunds is being determined by the CIT. As of September 30, 1998, approximately $1.435 billion was collected on exports.

* * *

Adequacy of the Harbor Maintenance Trust Fund

Overall, much uncertainty still exists with regard to the future balance of the Trust Fund because of the remaining outstanding issues associated with the ongoing GATT action and continuing legal challenges to the HMT as applied to the remaining collection categories. However, the current HMTF balance, ($1.289 billion entering FY 1999 and projected to exceed $1.9 billion at the end of the year), in conjunction with the revenue stream remaining from HMT collections on imports, domestic shipments, passengers and foreign trade zone cargo (an estimated $600-700 million annually), remains sufficient to recover eligible expenditures until an alternative funding source is in place.

Table ES-1
Harbor Maintenance Trust Fund Revenues and Transfers: Actual (Fiscal Years 1997 & 1998) and Projected (Fiscal Year 1999)
(thousands of dollars)

	FY 1997[1]	FY 1998[2]	FY 1999[3]	FY 2000[5]
Initial Balance	$866,063	$1,112,241	$1,289,000	NA
Revenues (HMT & Interest)	789,166	687,870	655,000	NA
Total Available	1,655,230	1,800,111	1,944,000	NA
Transfers (Expenditures)	549,502	511,093	19,700[4]	NA
Surplus/ (Deficit)	$1,105,728	$1,289,018	$1,924,300	NA

---

[1] and [2] FY 1997 and FY 1998 amounts are from the Funds Accounting Branch, Financial Management Services, Department of Treasury. The FY 1998 beginning balance differs from the FY 1997 closing balance due to an accounting reconciliation made by the Department of Treasury.

[3] FY 1999 amounts are based on the FY 2000 Budget Request.

[4] Note that Energy and Water Development Appropriations Act for FY 1999 did not provide for the recovery of USACE O&M expenditures from the HMFT. For FY 1999 the only expenditures to be recovered would be for: construction of DMDFs ($3.5 million); administration of the fund ($3.0 million); and O&M and rent payments for the St. Lawrence Seaway ($13.2 million).

[5] FY 2000 Budget request is based on enactment of Harbor Services Fun legislation to replace the HMTF. Consistent with this proposal, the balance of the HMTF funds at the close of FY 1999 would be transferred to the new HSF in FY 2000.

* * *

CHALLENGES TO THE HARBOR MAINTENANCE TAX

23. **Supreme Court Affirms that HMT is Unconstitutional as Applied to Exports.** On October 25, 1995, the U.S. Court of International Trade (CIT) issued a summary judgment in the case *United States Shoe Corp. v. The United States, 907 F. Supp. 408,* finding the HMT unconstitutional under the export clause of the Constitution (Article I. Section 9. Clause 5) that provides that *"No Tax or Duty shall be laid on Articles exported from any State."* It also enjoined the Customs Service from collecting the fee. However, in response to a motion filed by the U.S. Department of Justice, the CIT agreed to let Customs continue to collect the fee until the conclusion of any appellate proceedings.

24. The CIT's ruling was affirmed in a 4-to-1 decision issued on June 3, 1997 by the U.S. Court of Appeals for the Federal Circuit, *114 F. 3d 1564,* and on March 31, 1998 by the U.S. Supreme Court, *140 L. Ed. 2d 453; 118 S.Ct. 1290.* In its unanimous decision, the U.S. Supreme Court confirmed that levying a tax on the value of commercial cargo loaded for export violated the export clause of the Constitution. The Supreme Court had previously held that the export clause categorically bars Congress from imposing any tax on exports *(United States v. International Business Machines Corp., 517 U.S. 843 (1996)).* The export clause does not, however, prohibit a user fee, provided the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government supplied services. The Supreme Court cited *Pace v. Burgess, 92 U.S. 372, 375-376 (1896),* as an acceptable user fee. *Pace* established that the connection between the service that the Government renders and the compensation it receives for that service must be related and not excessive. Such a fee must be based on a fair approximation of use and must not be excessive in relation to the Government's cost of the conferred benefits.

25. The Supreme Court reaffirmed this principle in *U.S. Shoe*; noting that its decision "*does not mean the exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance.*" The Court held, however, that such a fee must fairly match the exporter's use of port services, and that the HMT did not satisfy this test. There must be a close connection between the services provided by the Government and the compensation received and the *ad valorem* tax does not provide such a connection because the value of exports does not correlate reliably with the Federal harbor services used by exporters. Instead, "*the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging*".

26. As a result of the Supreme Court decision, the U.S. Customs Service published a notice in the Federal Register advising exporters that they should stop paying the HMT effective April 25, 1998. Late in 1998 the Department of Justice ruled that refunds to exporters will be paid out of the fund established by 31 U.S.C. 1322, which allows repayments of amounts which have erroneously been collected into the Treasury. However, several important legal issues relating to the issue of refunds remain outstanding or were only partially settled. These issues include: whether litigants are eligible for refunds that will include interest on past tax payments; and the extent of eligibility within the two-year Statute of Limitations on Customs refunds.

27. There is currently no precise estimate of the magnitude of eligible refunds. There are about 5,700 HMT cases currently pending before the CIT. The ultimate amount of the refunds is being determined by the Court of International Trade. As of September 30, 1998, about $1.435 billion had been collected from exporters, including approximately $95.0 million in FY 1998. Depending on whether the refunds will include interest and the manner in which the two-year statue of limitations on Customs refunds

is to be applied, the total amount to be repaid to exporters could be a formidable sum, possibly exceeding $1 billion or even approaching the $1.435 billion collected through FY 1998.

28. The *U.S. Shoe* decision affects only exports, which represented approximately 30 percent of HMTF revenues during FYs 1996 and 1997 (Table 4). In a separate ruling, *Carnival Cruise Lines, Inc., v. United States, 929 F. Supp. 1570 (C.I.T., 1996),* the CIT ruled that the statutory provision exacting revenue from exports was severable from the remainder of the law and that this challenge would not apply to traffic other than exports (i.e., imports and passengers). The CIT has also designated other test cases on issues relating to jurisdiction and statute of limitations, including claims that there is no statute of limitations and test cases on the constitutionality of the HMT on domestic shipments, imports into foreign trade zones, and imports in general.

29. In another decision the CIT ruled that the HMT is also unconstitutional as applied to the embarkation of cruise passengers and has ordered refunds to the plaintiff *(Princess Cruises, Inc., v. United States, 1998 Court of International Trade LEXIS 70 (June 9, 1998)).* The Government has appealed this ruling to the Federal Circuit Court.

* * *

HARBOR MAINTENANCE TAX REVENUES

36. **Collections and Receipts**. All commerce subject to the HMT incurs the same 0.125 percent *ad valorem* tax. Historically, imports have provided the largest share of HMT revenue as they have led in both the total volume and value of cargo subject to the tax (see Table 3). Key imports tend to consist of higher value commodities (e.g., electronics, automobiles, etc.), while U.S. exports and domestic cargo have generally been dominated by lower value cargoes (e.g. grain, coal, paper, etc.). Table 4 shows revenue paid into the HMTF since Fiscal Year 1987, based on actual collections

reported by the U.S. Customs Service through the last day of each Fiscal Year 1987.

37. Total revenue collections shown in this table differ slightly from the "official" HMT deposits discussed in paragraph 43 (Table 6) because the Treasury Income Statement of the HMTF, like the Budget of the United States, must rely on revenue estimates prepared weeks or months before the close of the fiscal year. The Department of the Treasury reconciles differences between actual fee receipts as reported by the Customs Service and its estimates on a monthly basis, as well as at the beginning of each fiscal year. Only the U.S. Customs Service reports actual revenue by source.

Table 4
Harbor Maintenance Tax and Trust Fund
Collections by Source - Fiscal Years 1987 through 1998
(thousands of dollars)

Fiscal Year	Imports	Exports	Foreign Trade Zone	Domestic	Passengers	Net Collections	Cumulative Total
FY 1987	$ 43,249	$ 6,777	$ 677	- $ 2,414	$ 120	$ 53,237	$ 53,237
FY 1988	99,793	35,938	3,120	9,170	551	148,572	201,809
FY 1989	105,927	44,618	3,876	8,590	666	163,677	365,486
FY 1990	109,215	45,808	4,020	9,069	559	168,671	534,157
FY 1991	258,321	93,194	9,166	19,518	1,977	382,176	916,333
FY 1992	342,402	142,916	16,974	28,451	3,275	534,018	1,450,351
FY 1993	361,678	169,141	20,959	31,858	4,748	588,384	2,038,735
FY 1994	391,679	168,241	21,895	34,558	4,811	621,184	2,659,919
FY 1995	418,858	214,821	14,548	20,241	2,792	671,260	3,331,179
FY 1996	409,708	209,217	27,982	26,788	3,179	676,874	4,008,053
FY 1997	438,395	209,439	48,444	32,828	3,865	732,971	4,741,024
FY 1998	462,895	94,998	45,319	39,158	2,460	644,830	5,385,854
Totals	$ 3,442,120	$ 1,435,108	$ 216,980	$ 262,643	$ 29,003	$ 5,385,854	5,385,854

Source: Office of Finance, U.S. Customs Service, Department of the Treasury
Notes: HMT collections will differ from deposits into the HMTF due to reporting time and estimate errors.
Effective January 1, 1991, the HMT increased from 0.04% *ad valorem*, to 0.125%
HMT collections on exports halted April 25, 1998.

* * *

45. **Compliance**. With the passage of Section 683 of P.L. 103-182 (107 Stat. 2057), funds were authorized for the administration and enforcement of the HMT. However, it was not until FY 1996 that monies were appropriated for this purpose. As shown in Table 4, revenue in FY 1995 from domestic shippers and passenger vessels showed a conspicuous decline, as did revenue from foreign trade zones. Given these decreases in revenue, most of the past efforts by the Department of Treasury have focused on addressing these sectors. These efforts to improve compliance appear to have been partially successful as domestic and foreign trade zone collections have significantly increased over those in FY 1995. However, as previously discussed, passenger collections have continued to lag, with the FY 1998 revenue ($2,460,000) representing the lowest amount since FY 1991.

46. In addition to the administration and enforcement funding provided to the U.S. Customs Service for FYs 1996-1998, funding has also been made available to the Corps in FY 1998 to work with Customs to improve the collection and analysis of domestic receipts. The funding is being used to develop a system to collect and validate shipper information required by the Customs Service for auditing domestic HMT collections. In light of the past variations in the level of domestic collections and concerns expressed by the WTO that the U.S. has not fully collected fees due from domestic shippers, every reasonable effort is being taken to assure full compliance on the domestic side. The goal of this effort is to increase the accuracy and completeness of domestic shipping information in order to improve the ability of the Federal government to verify the level of compliance.

47. **Harbor Maintenance Trust Fund Balances**. According to the Financial Management Services Division of the Department of the Treasury, the FY 1998 closing balance was $1,289,018,000. The year-end Treasury Income

Statement shows "Net Receipts" of $687,870,000 for FY 1998, including "Interest Income" of $66,370,000. "Interest" represents the total interest accrued on interest bearing securities during the fiscal year. This includes interest actually realized from HMTF funds invested in securities that mature during that year, along with estimates of interest earnings on HMTF funds invested in longer-term securities. Only the former (the interest actually collected) is available for transfer from the fund and is reported by the Treasury Department to the Office of Management and Budget. For FY 1998 the interest actually deposited in the fund was $28.7 million.

48. **Harbor Maintenance Trust Fund Projections**. As a result of the *U.S. Shoe* decision, the HMT is no longer being collected on exported goods. Under existing law U.S. Customs will continue to collect the HMT on imports, domestic shipments, foreign trade zone cargo and passengers. Table 7 shows actual HMTF revenues and transfers for FYs 1997-1998 and the corresponding estimated amounts for Fiscal Year 1999.

49. The FY 1999 revenue estimate reflects the elimination of an estimated 30 percent of HMT collections that would have been generated from exports prior to *U.S. Shoe*. The 30 percent share is based on the export collection share for Fiscal Years 1996 and 1997. Actual HMT collections for FY 1998 include the revenue generated from exports until collections were halted on April 25, 1998.

Table 6
Harbor Maintenance Trust Fund Revenues and Transfers
Fiscal Years 1988 through 1998
(thousands of dollars)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Beginning Balance	$15,199	$ 9,715	$ 12,312	$ 30,254	$ 72,795	$ 120,931	$ 303,277	$ 451,385	$ 621,194	$ 866,063	$ 1,112,241
Revenues:											
Harbor Maint. Tax	$144,001	$166,000	$180,493	$ 374,420	$505,827	$628,462	$622,253	$670,532	$698,267	$735,534	$621,500
Toll Receipts	$10,448	$9,806	$8,849	$9,267	$8,733	$8,739	$11,112	$173	$0	$0	$0
Interest*	$6,528	$7,343	$8,281	$11,814	$16,502	$13,521	$12,826	$30,186	$40,870	$53,632	$66,370
Net Revenue	$160,977	$183,149	$197,623	$395,501	$531,062	$650,722	$646,191	$700,891	$739,137	$789,166	$687,870
Net Available	$176,176	$192,864	$209,935	$425,755	$603,571	$771,653	$949,468	$1,152,276	$1,360,331	$1,655,230	$1,800,111
Transfers:											
USACE	$148,000	$159,026	$159,074	$333,401	$462,229	$446,434	$476,620	$519,196	$482,126	$535,987	$496,900
St. Lawrence Seaway	$9,424	$10,382	$11,397	$9,075	$10,950	$13,584	$10,765	$10,193	$9,539	$10,322	$11,000
SLS Toll Rebates	$8,895	$10,977	$9,041	$10,298	$9,565	$8,074	$9,546	$1,512	$0	$0	$0
Dept. of Transportation	$0	$0	$0	$0	$16	$160	$175	$181	$169	$193	$193
Administrative Costs	$142	$167	$169	$186	$184	$124	$0	$0	$3,000	$3,000	$3,000
Net Expenditures	**$166,461**	**$180,552**	**$179,681**	**$352,960**	**$482,944**	**$468,376**	**$497,106**	**$531,082**	**$494,634**	**$549,502**	**$511,093**
Surplus/(Deficit)	**$9,715**	**$12,312**	**$30,254**	**$72,795**	**$120,627**	**$303,277**	**$452,362**	**$621,194**	**$865,497**	**$1,105,728**	**$1,289,018**

Source: Funds Accounting Branch, Financial Management Services, Department of the Treasury
* Does not include Interest Income which is not available for obligation ($172,000 in FY 1998).

** Interest represents the total interest accrued on interest bearing securities during the fiscal year, including interest from securities that matured in FY 1998 and an estimate of interest earnings on longer-term investments. For FY 1998 the interest actually deposited in the fund was $28.7 million.

UNITED STATES,

Petitioner

v.

UNITED STATES SHOE CORPORATION
No. 97-372
SUPREME COURT OF THE UNITED STATES

1998 U.S. TRANS LEXIS 58

March 4, 1998, Wednesday, Washington, D.C.

*1 The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JAMES R. ATWOOD, ESQ., Washington, D.C.; on behalf of the Respondent.

OPINION: PROCEEDINGS

11:20 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 97-372, United States v. United States Shoe Corporation.

Mr. Wallace, you may proceed whenever you're ready.

* * *

QUESTION:. . . so--and my question is, is there anything else in the wake of the IBM decision that's in the lower courts now that we might want to take account of as we decide this case?

MR. WALLACE: No.

Supreme Court, U.S.
FILED
NOV 15 2000
CLERK

(2)

No. 00-482

In the Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
JEFFREY A. BELKIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13pp

QUESTION PRESENTED

Whether a statute that allows interest to be paid on overpayments of an "internal-revenue tax" (28 U.S.C. 2411) authorizes interest on refunds of a customs assessment that Congress has specified "shall not be treated as a tax for purposes of * * * any * * * provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. 4462(f)(3)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

American Nat'l Bank & Trust Co. of Chicago v. *Haroco, Inc.*, 473 U.S. 606 (1985)	9
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989)	9
Library of Congress v. *Shaw*, 478 U.S. 310 (1986)	9
Mazer v. *Stein*, 347 U.S. 201 (1954)	9-10
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940)	9
Stone v. *Powell*, 428 U.S. 465 (1976)	9
United StatesShore Corp. v. *United States*:	
907 F. Supp. 408 (Ct. Int'l Trade 1995)	2
924 F. Supp. 1191 (Ct. Int'l Trade 1995)	2
United States v. *United States Shoe Corp.*, 523 U.S. 360 (1998)	3, 5, 6, 7

Constitution and statutes:

U.S. Const. Art. I, sec. 9, cl. 5	2, 6
Harbor Maintenance Revenue Act of 1986, 26 U.S.C. 4461	2
26 U.S.C. 4462(f)(1)	7
26 U.S.C. 4462(f)(2)	5, 7
26 U.S.C. 4462(f)(3)	4, 5, 6
26 U.S.C. 9505(b)	7
26 U.S.C. 9505(c) (1994 & Supp. IV 1998)	7
28 U.S.C. 2411	2, 3, 4, 5, 6, 7, 9

In the Supreme Court of the United States

No. 00-482

INTERNATIONAL BUSINESS MACHINES CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 201 F.3d 1367. The opinion of the Court of International Trade (Pet. App. 15a-21a) is reported at 20 Ct. Int'l Trade 206.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on January 19, 2000. A petition for rehearing and suggestion for rehearing en banc was denied on May 31, 2000. (Pet. App. 33a). The Chief Justice extended the time in which to file a petition for writ of certiorari to September 28, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i).

STATEMENT

1. In 1986, Congress enacted the Harbor Maintenance Tax, 26 U.S.C. 4461, to help fund various harbor improvement programs. That statute imposes a fee on port use by importers, exporters, domestic shippers and passenger liners. In 1995, however, the Court of International Trade held that application of the Harbor Maintenance Tax to exported goods violates the Export Clause of the Constitution, which specifies that "[n]o Tax or Duty shall be laid on Articles exported from any State" (U.S. Const. Art. 1, § 9, Cl. 5). *United States Shoe Corp.* v. *United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The judgment entered in that case required a refund of the Harbor Maintenance Tax payments on exports "together with interest and costs as provided by law." *United States Shoe Corp.* v. *United States*, 924 F. Supp. 1191 (Ct. Int'l Trade 1995); Pet. App. 39a-40a. The court stayed enforcement of that judgment—and stayed proceedings in other similar cases—until the conclusion of appellate proceedings. *Id.* at 38a.

On January 5, 1996, the exporter in *United States Shoe* filed a motion in the Court of International Trade for an award of prejudgment and post-judgment interest. On February 7, 1996, the court, while noting that it lacked jurisdiction to alter the judgment from which an appeal had already been taken in that case, stated that, "[b]ecause the issue [of entitlement to interest] has been fully briefed under the captioned case by the attorneys involved in the numerous cases stayed hereunder * * * the court will address this matter under this caption." Pet. App. 17a-18a. The court then concluded that interest should be awarded on refunds of the Harbor Maintenance Tax under 28 U.S.C. 2411,

which authorizes interest on "any overpayment in respect of any internal-revenue tax" (*ibid.*). Pet. App. 19a-21a. The court did not calculate any award of interest at that time; instead, the court stayed further proceedings pending a final decision on appeal in that case. *Id.* at 38a.

2. In 1998, in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, this Court upheld the determination of the Court of International Trade that the Harbor Maintenance Tax may not constitutionally be applied to exported goods. After that ruling was entered, the Court of International Trade devised a "test case" procedure to determine the appropriate method "for the entry of judgment with interest * * * ." Pet. App. 36a. The parties thereafter designated the present case as the test case for determining the propriety of an award of interest.

On June 17, 1998, after receiving briefs from interested parties, the court (i) entered judgment for petitioner in the principal amount of $330,689, (ii) specified "that interest pursuant to 28 U.S.C. § 2411 is owing on the aforesaid principal amount," and (iii) ordered "that all briefs on the issue of interest * * * filed in *U.S. v. United States Shoe Co.*, Court No. 94-11-00668 be deemed filed herein." Pet. App. 35a.[1]

3. In the court of appeals, the government argued that neither 28 U.S.C. 2411 nor any other statutory or constitutional provision authorizes an award of interest on refunds of the Harbor Maintenance Tax. Petitioner

---

[1] The Court of International Trade entered a similar judgment in *United States Shoe* on June 26, 1998. Pet. App. 35a. The government filed its notice of appeal in this case and in *United States Shoe* on August 7, 1998. The appeal in *United States Shoe* is stayed pending final resolution of the appeal in this case.

elected to rely solely on statutory grounds and did not rely upon any constitutional theory for an award of interest.

The Federal Circuit reversed the judgment insofar as it awarded interest in this case. Pet. App. 1a-14a, 31a. The court concluded that 28 U.S.C. 2411—which authorizes interest on "any overpayment * * * of any internal-revenue tax"—has no application to this case because Congress specified in 26 U.S.C. 4462(f)(3) that the Harbor Maintenance Tax "shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Pet. App. 6a (quoting 26 U.S.C. 4462(f)(3)). Congress thus specified that the Harbor Maintenance Tax is to be administered and enforced as "a customs duty, and not a tax." *Id.* at 6a. The court concluded that 28 U.S.C. 2411, which authorizes interest only on overpayments of internal revenue taxes, provides no basis for an award of interest on this customs exaction. Pet. App. 12a-13a.[2] Since petitioner had not raised any constitutional basis for an award of interest, the court of appeals did not address any such contention.

4. In a petition for rehearing and rehearing *en banc*, however, petitioner sought to raise constitutional arguments on appeal for the first time. The government's brief in response to the petition for rehearing noted that petitioner had waived any constitutional arguments by not presenting them in its opening brief. The

---

[2] Petitioner does not now contend that the court of appeals and the Court of International Trade erred in rejecting alternative statutory grounds for awarding interest on Harbor Maintenance Tax payments.

court of appeals denied the petition for rehearing and rehearing *en banc* without opinion. Pet. App. 33a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the asserted constitutional issues that petitioner now seeks to raise were not raised in the court of appeals and are thus not properly presented in this case. Further review is therefore not warranted.

1. a. The only question properly presented to the court of appeals was correctly resolved by that court. The court of appeals correctly concluded that 28 U.S.C. 2411, which authorizes interest on "any overpayment * * * of any internal-revenue tax," does not apply to this case because 26 U.S.C. 4462(f)(3) specifies that the Harbor Maintenance Tax "shall *not* be treated as a tax for purposes of * * * any * * * provision of law relating to the administration and enforcement of internal revenue taxes." *Ibid.* (emphasis added). Congress elected to treat the Harbor Maintenance Tax as a customs duty, rather than as an internal revenue tax. *United States* v. *United States Shoe Corp.*, 523 U.S. at 365-366. In this context, interest cannot be recovered against the United States under 28 U.S.C. 2411 because that statute does not directly and unambiguously provide for an award of interest for customs assessments. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986).

Petitioner argued in the court of appeals that the requirement that the Harbor Maintenance Tax be "treated as if such tax were a customs duty" (*United States* v. *United States Shoe Corp.*, 523 U.S. at 365 (quoting 26 U.S.C. 4462(f)(2)) should not preclude "judi-

cial" awards of interest on "internal-revenue taxes" under 28 U.S.C. 2411. Pet. App. 19a-21a. The court of appeals correctly concluded, however, that the requirement that Harbor Maintenance Tax payments be treated as customs duties in their "administration and enforcement" (26 U.S.C. 4462(f)(3)) precludes their treatment as an "internal-revenue tax" under 28 U.S.C. 2411. The court noted that the Internal Revenue Code provides an entire body of provisions for enforcement of internal revenue taxes, which includes a chapter on "Judicial proceedings." "That chapter includes provisions regarding civil actions by the United States (subchapter A), proceedings by taxpayers and third parties (subchapter B), the Tax Court (subchapter C), and court review of Tax Court decisions (subchapter D)." Pet. App. 10a. The court properly concluded (*ibid.*) that, in removing the Harbor Maintenance Tax from the judicial and administrative enforcement mechanisms that have been adopted for internal revenue taxes, Congress necessarily precluded any application to this customs assessment of a statute that awards interest only for an "overpayment" of an "internal-revenue tax." 28 U.S.C. 2411.

b. Petitioner errs in asserting (Pet. 14-15) that this Court implicitly resolved the question presented in this case simply by stating in *United States Shoe* that this customs assessment "bears the indicia of a tax." 523 U.S. at 367. The question presented in *United States Shoe* was whether the Harbor Maintenance Tax was an unconstitutional "Tax or Duty" imposed on exports (U.S. Const. Art. 1, § 9, Cl. 5) or was, instead, a permissible user fee designed merely to reimburse the government for services that it provides to commerce.

523 U.S. at 367-370.[3] In addressing and resolving that issue, the Court obviously did not address or consider whether this assessment is an "internal-revenue tax" for the purposes of 28 U.S.C. 2411. The Court's holding in that case was nonetheless directly inconsistent with petitioner's claim here—for in *United States Shoe* the Court expressly stated that, "for administrative, enforcement, and jurisdictional purposes, the [Harbor Maintenance Tax] should be treated 'as if [it] were a customs duty'" and *not* as an internal revenue tax. 523 U.S. at 367 (quoting 26 U.S.C. 4462(f)(1), (2)).[4]

2. Petitioner incorrectly asserts (Pet. 16) that the judgment entered by the Court of International Trade in the *United States Shoe* case—which states that the exporter in that case may recover "interest and costs as provided by law" (Pet. App. 40a)—bars the United States from challenging the award of interest in this case. In the first place, petitioner did not make this claim in the court of appeals and is therefore barred from raising it here. Secondly, the fact that the recited order of the Court of International Trade generally provided for an award of interest as "provided by law" simply begs the question presented in the subsequent proceedings in that court and in the court of appeals—which is whether interest *is* "provided by law." Indeed,

---

[3] That question turned on whether the Harbor Maintenance Tax possessed "the attributes of a generally applicable tax or duty" or was "instead, a charge designed as compensation for Government-supplied services, facilities, or benefits." 523 U.S. at 363.

[4] Petitioner errs in asserting that the United States utilizes funds placed in the Harbor Maintenance Trust Fund to "fund activities without seeking congressional appropriations" (Pet. 13). The money placed in the Fund, and the interest earned on those monies, may be withdrawn only by appropriation for specified purposes. 26 U.S.C. 9505(b), (c).

the Court of International Trade expressly acknowledged the fact that its prior orders had not conclusively resolved this issue by setting the present case as a test case to address the interest issue in proceedings following the affirmance of the judgment on the merits in *United States Shoe*. See page 3, *supra*.

Petitioner's newly minted claim is, in fact, entirely divorced from the record of this case. All of the parties to these combined proceedings have recognized that the government is not precluded from contesting whether interest may be awarded on refunds of the Harbor Maintenance Tax. All parties, including petitioner, briefed the question of interest in this case. Pet. App. 15a. The Court of International Trade and the Federal Circuit both addressed the interest question on the merits in their decisions in this case. Indeed, this case was expressly designated as the "test case" for addressing the interest issue by the Court of International Trade. *Id.* at 36a-37a; see page 3, *supra*. And, following the entry of the judgment in this case, petitioner (along with other parties challenging the Harbor Maintenance Tax in the Court of International Trade) agreed to "*consent* to entry of judgment with interest in this case *for the purpose of permitting the Government an opportunity to appeal the award of interest* * * * ." Pet. App. 35a (emphasis added).

Petitioner did not, at any point in the court of appeals, assert that the government is precluded from challenging the award of interest in this case. As a result, the Federal Circuit had no occasion to—and did not—address petitioner's novel contention. The suggestion that this Court should address this new claim *sua sponte* (Pet. 16-17) is thus both unwarranted and

inconsistent with the clear record of this case. See, *e.g.*, Pet. App. 35a.[5]

3. Petitioner seeks to raise several other issues that it failed to raise below. In particular, petitioner asks this Court to determine whether any provision of the Constitution would require interest to be paid on refunds of the Harbor Maintenance Tax. That question, however, was not raised by petitioner in its briefs in the courts below. As a result, the court of appeals neither considered nor addressed that question. Petitioner first raised its constitutional arguments in a petition for rehearing that was filed after the decision of the court of appeals was entered in the government's favor. The court of appeals thereafter declined, without comment, to consider petitioner's new and belated contentions at that late stage of this case. Especially in view of the fact that neither of the courts below has addressed the issues that petitioner now belatedly seeks to raise, there are no "exceptional circumstances" that would warrant review by this Court. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989) ("[w]e decline to address this argument because respondent failed to raise it below"); *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). See also *American National Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 608 (1985); *Mazer* v. *Stein*,

---

[5] Subsequent to the decision of this Court in *United States Shoe*, the Court of International Trade amended the judgment in that case to provide for interest pursuant to 28 U.S.C. 2411. That order is itself currently stayed and is pending on appeal to the Federal Circuit pending final resolution of this case. See note 1, *supra*. Because that judgment remains pending on appeal, it obviously does not preclude litigation of that same issue by the United States in the court of appeals.

347 U.S. 201, 206 n.5 (1954) ("[w]e do not reach for constitutional questions not raised by the parties").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
JEFFREY A. BELKIN
Attorneys

DECEMBER 2000

No. 00-482

(3)

Supreme Court, U.S.
FILED
DEC 14 2000
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF ELLIOTT TURBOMACHINERY CORPORATION, CAPITAL-MERCURY SHIRT CO., RAPID INDUSTRIAL PLASTICS CO., INC., ALFRED C. TOEPFER INTERNATIONAL, INC., BUNGE CORPORATION, MONDIAL INTERNATIONAL CORP., NEW HOLLAND NORTH AMERICA, INC. AND FIRMENICH, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

PATRICK D. GILL
RODE & QUALEY
295 Madison Avenue
New York, NY 10017
(212)-685-4437
Counsel for *Amicus Curiae*
Capital-Mercury Shirt Co.

BARRY E. COHEN
Counsel of Record
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202)-624-2997
Counsel for *Amicus Curiae*
Elliott Turbomachinery Corp.

(List of Counsel Continued Inside Front Cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

STEVEN H. BECKER
COUDERT BROTHERS
1114 Avenue of the Americas
New York, NY 10036
212-626-4400
Counsel for *Amicus Curiae*
Alfred C. Toepfer
International, Inc.

STEVEN P. FLORSHEIM
GRUNFELD, DESIDERIO
LEIBOWITZ & SILVERMAN LLP
245 Park Avenue, 33rd Floor
New York, NY 10167
212-557-4000
Counsel for *Amicus Curiae*
Mondial International Corp.

JAMES S. O'KELLY
BARNES, RICHARDSON &
COLBURN
475 Park Avenue
New York, NY 10016
212-725-0200
Counsel for *Amicus Curiae*
Firmenich, Inc.

MELVIN S. SCHWECHTER
LEBOEUF, LAMB, GREENE &
MACRAE, L.L.P.
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
202-986-8000
Counsel for *Amicus Curiae*
Rapid Industrial Plastics Co.,
Inc.

PETER JAY BASKIN
SHARRETTS, PALEY, CARTER &
BLAUVELT, P.C.
75 Broad Street, 26th Fl.
New York, NY 10004
212-425-0055
Counsel for *Amicus Curiae*
Bunge Corporation

MUNFORD PAGE HALL, II
DORSEY & WHITNEY, LLP
1001 Pennsylvania Ave., N.W.
Suite 300, South
Washington, D.C. 20004
202-824-8800
Counsel for *Amicus Curiae* New
Holland North America, Inc.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
STATEMENT	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE COURT OF APPEALS MISREAD THE GOVERNING STATUTES	4
A. The Legislative Setting of the HMT	4
B. The Court of Appeals Incorrectly Held That Congress Did Not Authorize Interest on HMT Refunds	6
1. The Customs Duty Interest Statute is Applicable	6
2. Congress Could Not Have Intended to Exclude Refunds of Export-Related HMT Payments from an Interest Requirement, When It Authorized Interest on Income Taxes and Other HMT Refunds	8
II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE PETITION TO REVIEW WHETHER THERE WAS AN UNCONSTITUTIONAL TAKING OF INTEREST EARNED ON HMT EXPORT TAXES	10
A. The HMT on Exports Effected a Taking of Private Property Under the Fifth Amendment	11

TABLE OF CONTENTS—Continued

Page

B. Just Compensation Includes Interest Earned On HMT Export Taxes From the Date of the Taking To the Date of Payment of Principal 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES — Page

Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916) 12
Henkels v. Sutherland, 271 U.S. 298 (1926) 14
International Bus. Machs. Corp. v. United States, 20 Ct. Int'l Trade 206 (1996) 2
International Bus. Machs. Corp. v. United States, 201 F.3d 1367 (1999) 2, 7, 8, 13
Library of Congress v. Shaw, 478 U.S. 310 (1986) 13
Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 12
Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 11, 14
Paris Adult Theatre I v. Slaton, 408 U.S. 921 (1972) 6
Procter & Gamble Distrib. Co. v. Sherman, 2 F.2d 165 (S.D.N.Y. 1924) 3
Stewart Mach. Co. v. Davis, 301 U.S. 548 (1937) 12
United States Shoe Corp. v. United States, 114 F.3d 1564 (1997) 3
United States Shoe Corp. v. United States, No. 94-11-00668 (Ct. Int'l Trade, Dec. 4, 1995) 3
United States v. Hotel Thayer Co., 329 U.S. 585 (1947) 15
United States v. United States Shoe Corp., 523 U.S. 360 (1998) 1, 2, 3, 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 12
U.S. Const. art I, § 8, cl. 1 11
U.S. Const. art. I, § 9, cl. 6 11

TABLE OF AUTHORITIES—Continued

STATUTES	Page
19 U.S.C. § 1505(c)	2, 6, 7
26 U.S.C. § 4462(f)(1)	4, 6, 7, 9
26 U.S.C. § 4462(f)(2)	4, 7
26 U.S.C. § 4462(f)(3)	9
26 U.S.C. § 9602(b)(1)	14
26 U.S.C. § 9602(b)(3)	14
28 U.S.C. § 2411	2, 8

INTEREST OF AMICI CURIAE

The *amici curiae* submitting this brief are, like Petitioner International Business Machines Corporation, exporters of commercial goods by ocean vessel.[1] Their cases remain before the Court of International Trade while this test case, selected by the trial court as the vehicle for appellate review of its decision granting interest on refunds of Harbor Maintenance Taxes, is further litigated. Some participated as *amici curiae* in the Court of International Trade and all participated as *amici curiae* in the Court of Appeals for the Federal Circuit when this case was before those courts. They have a substantial stake in the outcome of the question for which review is sought—whether petitioner and others similarly situated are entitled to interest on refunds of unlawfully collected Harbor Maintenance Taxes.

This *amicus curiae* brief is being filed with the consent of all parties. Letters of consent from counsel have been lodged with the Clerk of the Court.

STATEMENT

This case concerns the federal Harbor Maintenance Tax (HMT), 26 U.S.C. §§ 4461-62, an ad valorem tax imposed since 1987 on merchandise imported into, and exported from, the United States by ocean vessel. In *United States v. United States Shoe Corp*, 523 U.S. 360 (1998), this Court held that the tax, as imposed on exports, was unconstitutional as a

---

[1] No counsel for any party authored any part of this brief. No persons other than *amici curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

The *amici curiae* are Alfred C. Toepfer International, Inc., Bunge Corporation, Capital-Mercury Shirt Co., Elliott Turbomachinery Corp., Firmenich, Inc., Mondial International Corp., New Holland North America, Inc., and Rapid Industrial Plastics Co., Inc.

violation of the Export Clause (art. I, § 9, cl. 5) of the Constitution of the United States.

The current litigation arose because of the refusal of the United States to pay interest to the thousands of taxpayers eligible for HMT refunds following the Court's decision invalidating the tax as to exports, and presents the question of whether the United States is obliged to pay such interest. The trial court designated petitioner's case against the United States as a test case in which the United States could seek appellate review of that court's decision to award such interest under 28 U.S.C. § 2411 (providing for interest on certain refunds of internal revenue taxes). *International Bus. Machs. Corp. v. United States*, 20 Ct. Int'l Trade 206 (1996).

The trial court's decision was reversed by the Court of Appeals for the Federal Circuit (*International Bus. Machs. Corp. v. United States*, 201 F.3d 1367 (1999)) which held that neither 28 U.S.C. § 2411 nor two statutes providing for interest on refunds of customs duties (19 U.S.C. § 1505(c) and 28 U.S.C. § 2644) authorized payment of interest on HMT refunds.

SUMMARY OF ARGUMENT

In *United States Shoe*, this Court held that the Harbor Maintenance Tax, a tax codified in the Internal Revenue Code but required to be administered as a customs duty, was an unconstitutional tax on exports. *United States Shoe*, 523 U.S. at 363. In 28 U.S.C. § 2411 (1994), Congress authorized interest on refunds of "*any* internal-revenue tax" (emphasis added), and in 19 U.S.C. § 1505(c) (1994 & Supp. IV 1998), Congress authorized interest on customs duty refunds. In view of these statutory directions to award interest on tax and customs duty refunds, it was unremarkable that, when the Court of International Trade held the HMT assessed on exports to be in violation of the Constitution, it ordered that the unconstitutional exaction should be refunded "together

with interest and costs as provided by law." *United States Shoe Corp. v. United States*, No. 94-11-00668 (Ct. Int'l Trade, Dec. 4, 1995). When the trial court's judgment was affirmed by the Court of Appeals for the Federal Circuit (*United States Shoe Corp. v. United States*, 114 F.3d 1564 (1997)) and by this Court (*United States Shoe*, 523 U.S. 360), it was similarly unremarkable that there was no separate comment concerning the award of interest.

But there is something remarkable—and fundamentally wrong—about the decision below on which review is sought. Despite clear statutory direction to the contrary, that decision holds that no interest is due on refunds of the HMT imposed on exports. In holding that Congress did not authorize interest on refunds of the HMT imposed on exports from the United States, the Court of Appeals for the Federal Circuit misinterpreted the decision of this Court in *United States Shoe* which held the tax unconstitutional, and it misread the HMT statute, under which Congress authorized the payment of interest on HMT refunds in the same manner that Congress has authorized interest on refunds of income taxes and customs duties generally.

If, however, statutory grounds do not support interest, then there is a compelling constitutional argument that the exaction of an unconstitutional tax implicates a taxpayer's right to just compensation under the Takings Clause of the Fifth Amendment. The thoughtful words of Judge Learned Hand in *Procter & Gamble Distrib. Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924), ring ever so true in the context of the issues presented in the petition for a writ of certiorari:

> [I]t seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. . . . [I]n

> modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Amici curiae respectfully submit that the Court should accept both the statutory and constitutional issues for review. Each of these points is separately addressed below.

ARGUMENT

I. THE COURT OF APPEALS MISREAD THE GOVERNING STATUTES

A. The Legislative Setting of the HMT

The HMT is an administrative law hybrid. The statute was codified in Title 26 of the United States Code, the Internal Revenue Code, but Congress provided that it was to be treated as a customs duty, under Title 19 of the United States Code. *See* 26 U.S.C. § 4462(f)(1) (1994) ("all administrative and enforcement provisions of customs laws and regulations shall apply . . . as if such tax were a customs duty"), and 26 U.S.C. § 4462(f)(2) (1994) (for jurisdictional purposes, the tax "shall be treated as if such tax were a customs duty"). Thus, the HMT was given its legislative birth in the tax code, where it remains, but was to be administered and enforced as part of the customs laws of the United States.

One problem encountered by this hybrid legislation was determining which federal court had jurisdiction to hear constitutional challenges to the tax. Claims of unconstitutionality were initially brought in federal district courts, the Court of Federal Claims, and the Court of International Trade. The controversy over jurisdiction was among the issues addressed in *United States Shoe*, where the Court held that federal court jurisdiction existed under 28 U.S.C.

§ 1581(i), a statute establishing so-called "residual jurisdiction" in the Court of International Trade over cases against the United States arising from imports. 523 U.S. at 365-66.

In so holding, the Court affirmed the application of a jurisdictional statute, nominally applicable only to *imports*, to a challenge to the HMT on *exports*. The Court read the import terms of 28 U.S.C. § 1581(i) consistent with Congress' intent to apply the customs laws (which, by definition, apply only to imports) to the import *and* export applications of the HMT:

> This dispute, as the Federal Circuit stated, "involve[s] the 'administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." True, § 1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§]1581(i)(1)."

United States Shoe, 523 U.S. at 366 (citation omitted).

Thus, the Court interpreted as applicable to exports a jurisdictional statute which applied, by its terms, *only* to imports, because it concluded that is what Congress intended when it provided that the HMT was to be administered as a customs duty.

B. The Court of Appeals Incorrectly Held That Congress Did Not Authorize Interest on HMT Refunds.

1. *The Customs Duty Interest Statute is Applicable*

The Court of Appeals for the Federal Circuit departed from Congress' direction that "all administrative and enforcement provisions of customs laws and regulations shall apply . . . as if such [Harbor Maintenance] tax were a customs duty" (26 U.S.C. § 4462(f)(1) (1994)) when it refused to find statutory authority in the customs laws for interest on refunds of HMT payments in respect of exports. If the HMT on exports were a customs duty, the customs laws (in 19 U.S.C. § 1505(c)) would provide for interest on refunds of it. Since the Court previously held, in the jurisdictional context, that Congress intended customs statutes with wording limited to imports to be applied to exports under the HMT, the customs law interest statute should have been interpreted, in the same way, to apply to refunds of the HMT imposed on exports.[2]

The customs duty interest provision of 19 U.S.C § 1505(c) (1994 & Supp. IV 1998) reads:

> Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees and interest . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation.

---

[2] The applicability of 19 U.S.C. § 1505(c) to Petitioner's interest claim was addressed in the court of appeals, but was not among the specifc questions for which Petitioner sought review. Because of its importance to this case, the court should include this question as one for which review is granted. The Court has taken such action in the past. *See, e.g., Paris Adult Theatre I v. Slaton*, 408 U.S. 921 (1972).

This interest statute is, in its own way, comparable to 28 U.S.C. § 1581(i), the jurisdictional statute applicable to import duties, which the Court held authorized jurisdiction over an export tax. Section 1505(c) refers to imports (using the terms "importer of record," "estimated duties"), just as the jurisdictional statute (referring to "revenue from imports") did, and yet the Court in *United States Shoe* held that the jurisdictional statute was applicable to export taxes under the HMT.

The court of appeals rejected Section 1505(c) as "contemplat[ing] an entirely different factual scenario from the [case involving exports] before us." *International Bus. Machs.*, 201 F.3d at 1374. But the use of import-related language in the jurisdictional statute, coupled with the provision in the HMT statute that "the tax imposed by this subchapter shall be treated as if such tax were a customs duty" (26 U.S.C. § 4462(f)(2) (1994)) allowed this Court to hold that a statute authorizing suits against the United States arising out of imports was intended by Congress to authorize suits arising out of exports.

The Court's approach to statutory interpretation of the HMT legislation and due regard for congressional intent should similarly have led to the conclusion that Section 1505(c) authorized interest on refunds of HMT export taxes, based on the HMT statute that provided that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter . . . as if such tax were a customs duty. . . ." 26 U.S.C. § 4462(f)(1) (1994). The sterile statutory analysis of the court of appeals simply failed to recognize, as this Court recognized in *United States Shoe*, the breadth of Congress' direction to treat HMT payments as customs duties.

2. *Congress Could Not Have Intended to Exclude Refunds of Export-Related HMT Payments from an Interest Requirement, When It Authorized Interest on Income Taxes and Other HMT Refunds.*

If, on the other hand, the HMT on exports is treated for interest purposes not as a customs duty but as an internal revenue tax because of its codification in the Internal Revenue Code, 26 U.S.C., then 28 U.S.C. § 2411, which authorizes interest on judgments for overpayments of income taxes, provides the authorization for interest on refunds on HMT payments. The Court of International Trade held that interest was payable under 28 U.S.C. § 2411, and the court of appeals acknowledged that the provision would be applicable to refunds of HMT taxes but for its reading of the phrase "administration and enforcement" in 26 U.S.C. § 4462(f)(3) as precluding the application of this internal revenue interest statute to the HMT. *International Bus. Machs.*, 201 F.3d at 1372.

If, for some reason, the customs interest statute is not read as authorizing interest on HMT export tax refunds, then the internal revenue interest statute must be applicable. The language excluding laws relating to the "administration and enforcement of internal revenue taxes" from the HMT does not embrace an interest statute found in the Judiciary and Judicial Procedure title of the U.S. Code, which statute by its terms concerns not Executive Branch "enforcement" of tax laws, but the judicial action of issuing judgments for tax refunds. 28 U.S.C. § 2411 (1994).

But the court of appeals' decision—excluding from application *both* the customs duty refund interest statute and the internal revenue refund interest statute—has created a situation in which a refund of the HMT on exports, which can only be governed by the income tax laws and customs laws, is not subject to interest, while the refund of a tax codified and

administered as a tax, and the refund of a customs duty codified and administered as a customs duty, are subject to interest. The decision below has thus created an anomaly among federal laws imposing taxes on income and on goods in international commerce. If the court of appeals is correct, then refunds by the United States on HMT taxes in respect of exports, alone among income taxes and customs duties, would be payable free of interest.

When Congress anchored the HMT in both the income tax and customs laws, it surely did not intend that there would be any aspects of the HMT that would fall in some crevice between them. Thus, when Congress provided, in 26 U.S.C. § 4462(f)(3) (1994), that "[t]he tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes," it filled that exclusion with the administrative and enforcement provisions of the customs laws:

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter . . . as if such tax were a customs duty . . . .

26 U.S.C. § 4462(f)(1) (1994).

Both customs and internal revenue laws clearly provide that payors of the charges imposed thereunder are to receive interest on refunds of tax payments in excess of those required by law. Thus, the court of appeals could not have correctly read the HMT legislation as not providing for interest on refunds of the HMT in respect of exports, when Congress authorized interest on refunds of:

- internal revenue taxes (where Congress codified the HMT),

- customs duties (under which laws Congress directed that the HMT be administered), and
- the HMT imposed on imports.[3]

It is neither logical nor reasonable to conclude that Congress did not intend the interest provisions of at least one of these bodies of law to apply to refunds of the HMT imposed on exports. The effect of the court of appeals holding, however, is to create such an interest gap.

Accordingly, in addition to the reasons stated in the petition, the writ should be granted to review whether the appellate court's decision has allowed the United States to fail fully to implement this Court's unanimous decision in *United States Shoe* invalidating the HMT as applied to exports. The writ should also be granted to review whether the court of appeals has created an anomaly in the law by holding that interest on one particular federal tax refund was not authorized by Congress, where Congress has authorized interest on refunds of every other income tax and customs duty it has imposed.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE PETITION TO REVIEW WHETHER THERE WAS AN UNCONSTITUTIONAL TAKING OF INTEREST EARNED ON HMT EXPORT TAXES.

In promulgating the HMT on exports, the Government ventured into the one area constitutionally protected from its

---

[3] Any challenge to the imposition of the HMT on imported goods would be made via a protest of the Customs Service liquidation of the applicable entry. Interest on a refund paid as a result of the protest and a decision of the Court of International Trade would be authorized by 28 U.S.C. § 2644. Interest on a refund paid administratively by the Customs Service would be authorized under 19 U.S.C. § 1505(c).

quest for revenue—export taxes. Having been forced by the Court's decision in *United States Shoe* to return exactions collected through the exertion of a power expressly forbidden to it under the Constitution, the United States nevertheless asserts that the cloak of sovereign immunity permits it to retain the benefit of the millions of dollars in interest accrued as a result of its unlawful exactions. *Amici curiae* submit that the Takings Clause of the Fifth Amendment does not permit such injustice.

And so, in addition to the statutory question presented, the Court should also grant certiorari in order to consider the underlying question—Question 3 presented in the petition—of whether the just compensation guarantee under the Takings Clause of the Fifth Amendment requires the payment of interest here as part of the "full and perfect equivalent for the property taken". *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

A. The HMT on Exports Effected a Taking of Private Property Under the Fifth Amendment

Although the Constitution places certain limitations on Congress' taxing power such as appear under the Uniformity Clause[4] and the Port Preference Clause[5], the Export Clause is the single express prohibition on the Government's power to tax. Accordingly, when Congress enacted Section 4461(c)(1)(B), which taxed exports in violation of the Export Clause, it exerted a power expressly forbidden and denied to it under the Constitution. In so doing, the Government has

---

[4] "[A]ll duties, Imposts, and Excises shall be uniform throughout the United States." U.S. Const. art I, § 8, cl. 1.

[5] "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ." U.S. Const. art. I, § 9, cl. 6.

confiscated taxpayers' property, and the Takings Clause requires that just compensation under the Fifth Amendment be paid.

The Takings Clause of the Fifth Amendment affirmatively declares, "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. This Court has recognized that a tax imposed despite an express prohibition against such legislation may give rise to a taking under the Fifth Amendment:

> Except in rare and special instances, the . . . Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution . . . . That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and *forbidden* power, as, for example, the *confiscation of property* . . . . [or] if the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power *denied* by the Federal Constitution . . . .

Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) (emphasis added). *Accord Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1 (1916), and *Stewart Mach. Co. v. Davis*, 301 U.S. 548 (1937).

The court of appeals ignored the effect of this Court's precedents in denying interest on HMT payments collected in contravention of an express constitutional prohibition, and the Court should thus also grant review to consider the Takings Clause question thereby raised.

B. Just Compensation Includes Interest Earned On HMT Export Taxes From the Date of the Taking To the Date of Payment of Principal.

In holding that the United States is immune from the payment of interest on HMT refunds, the court of appeals characterized the issue as one of statutory interpretation to determine "whether Congress has expressly authorized interest on HMT refunds." *International Bus. Machs.*, 201 F.3d at 1370. Relying primarily on *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the court of appeals ruled that the United States' sovereign immunity foreclosed an award of interest in this case, as Congress had not waived that immunity through express statutory consent. *Id.*

But as emphasized by the Court in *Shaw*, the general rule of statutory waiver is inapplicable to constitutional claims for just compensation:

> *Apart from constitutional requirements*, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States. *The 'constitutional requirement'* arises in a taking under the Fifth Amendment. To satisfy the constitutional mandate, 'just compensation' includes a payment of interest.

Shaw, 478 U.S. at 317 & n.5 (emphasis added) (citations omitted).

As the HMT on exports implicates taxpayers' rights to just compensation under the Takings Clause, the general rule that the United States must expressly consent to liability for interest does not apply. Rather, it is the exclusive role of the Judicial Branch to determine what constitutes just compensation:

> It does not rest with . . . Congress or the legislature . . . to say what compensation will be paid, or even what

> shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and *the ascertainment of that is a judicial inquiry.*

Monongahela, 148 U.S. at 327 (emphasis added).

Moreover, in exercising this exclusive role, the Court has made clear that where, as here, the government invests confiscated assets in its own obligations,[6] just compensation under the Fifth Amendment includes interest earned on the taking:

> The Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment . . . in obligations of the United States, which income has been actually received by the Treasury and is in its possession . . . . Whether the Government shall pay interest on its obligations depends upon Congressional assent; but it cannot confiscate the property belonging to a citizen, or the increment of the proceeds into which such property has been converted any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.

Henkels v. Sutherland, 271 U.S. 298, 301 (1926).

Furthermore, since just compensation requires a "full and perfect equivalent for the property taken" (*Monongahela*, 148 U.S. at 326), the Court has held that the constitutional mandate requires interest from the date of taking to the date

---

[6] The Secretary of the Treasury is required by statute to invest HMT payments in interest-bearing obligations of the United States. 26 U.S.C. § 9602(b)(1) (1994). Interest earned on those obligations is retained in the Harbor Maintenance Trust Fund. 26 U.S.C. § 9602(b)(3) (1994).

of compensation, even in cases where a taking is otherwise lawful. *See United States v. Hotel Thayer Co.*, 329 U.S. 585 (1947) (stating that in certain circumstances where United States lawfully confiscates property under its power of eminent domain, just compensation requires that property owner receive interest from date of taking to date of payment).

Accordingly, to complement the statutory inquiry, the Court should also grant the petition in order to consider whether, if the court of appeals is correct in its interpretation of the statutes, there has been an unconstitutional taking that has confiscated millions of dollars in interest from several thousand taxpayers, in derogation of the Takings Clause and this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICK D. GILL
RODE & QUALEY
295 Madison Avenue
New York, NY 10017
(212)-685-4437
Counsel for *Amicus Curiae* Capital-Mercury Shirt Co.

BARRY E. COHEN
Counsel of Record
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202)-624-2997
Counsel for *Amicus Curiae* Elliott Turbomachinery Corp.

STEVEN H. BECKER
COUDERT BROTHERS
1114 Avenue of the Americas
New York, NY 10036
(212)-626-4400
Counsel for *Amicus Curiae* Alfred C. Toepfer International, Inc.

MELVIN S. SCHWECHTER
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
(202)-986-8000
Counsel for *Amicus Curiae* Rapid Industrial Plastics Co., Inc.

STEVEN P. FLORSHEIM
GRUNFELD, DESIDERIO
LEIBOWITZ & SILVERMAN
LLP
245 Park Avenue, 33rd Floor
New York, NY 10167
(212)-557-4000

Counsel for *Amicus Curiae*
Mondial International
Corp.

JAMES S. O'KELLY
BARNES, RICHARDSON &
COLBURN
475 Park Avenue
New York, NY 10016
(212)-725-0200

Counsel for *Amicus Curiae*
Firmenich, Inc.

PETER JAY BASKIN
SHARRETTS, PALEY, CARTER &
BLAUVELT, P.C.
75 Broad Street, 26th Fl.
New York, NY 10004
(212)-425-0055

Counsel for *Amicus Curiae* Bunge
Corporation

MUNFORD PAGE HALL, II
DORSEY & WHITNEY, LLP
1001 Pennsylvania Ave., N.W.
Suite 300, South
Washington, D.C. 20004
(202)-824-8800

Counsel for *Amicus Curiae* New
Holland North America, Inc.

Supreme Court, U.S.
FILED
DEC 14 2000
CLERK

(4)

No. 00-482

In the
Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Nancie G. Marzulla
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., N.W., Suite 410
Washington, DC 20036
202-822-6770

Counsel for *Amicus Curiae*

21 pp

QUESTION PRESENTED

Amicus curiae will address the following question:

Whether the Government's retention of interest earned on monies collected under the unconstitutional Harbor Maintenance Tax on exports is a taking of private property for which "just compensation" is required by the Fifth Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii-v

INTERESTS OF *AMICUS CURIAE*.....2

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT.....3

REASONS FOR GRANTING THE WRIT.....6

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BACKGROUND PRINCIPLES OF COMMON LAW AND PRIOR DECISIONS OF THIS COURT HOLDING CONCLUSIVELY THAT OWNERSHIP OF INTEREST FOLLOWS OWNERSHIP OF THE UNDERLYING PRINCIPAL.....6

II. THE GOVERNMENT IS CONSTITUTIONALLY OBLIGATED TO PAY BACK THE INTEREST THAT IT EARNED ON THE USE OF PETITIONER'S PROPERTY.....9

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES

Bennett v. Spear, 520 U.S. 154 (1997) 2

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).....2

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2

Fuller v. United States, 409 U.S. 488 (1973).....8

Himely v. Rose, 9 U.S. (5 Cranch) 313 (1809).....7

International Business Machines Corp. v. United States, 201 F.3d 1367 (Fed. Cir. 2000).....4-5

International Business Machines Corp. v. United States, No. 94-10-00625, 1998 WL 325156 (Ct. Int'l Trade June 17, 1998).....4-5

Jacobs v. United States, 290 U.S. 13 (1933).....10

Keene Corp. v. United States, 508 U.S. 200 (1993).....2

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 2, 6

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).....11

Phillips v. Washington Legal Found., 524 U.S. 156 (1998)..... 2, 5, 6, 7, 9, 12, 13

TABLE OF AUTHORITIES—cont.

Schneider v. California Dep't of Corrections,
151 F.3d 1194, 1201 (9th Cir. 1998).....7

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999),cert. granted, 120 S. Ct. 2003 (2000).....2

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997)..... 2

United States v. Causby, 328 U.S. 256 (1946).....12

United States v. General Motors Corp.,
323 U.S. 373 (1945).....7

United States v. United States Shoe Corp.,
523 U.S. 360 (1998).....3,4

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980).....5, 6, 10, 12, 13

CONSTITUTIONS

U.S. CONST. amend. V..... 8

STATUTES

26 U.S.C. §§ 4461.....3

26 U.S.C. § 9505.....3

28 U.S.C. § 2411.....5

TABLE OF AUTHORITIES—cont.

OTHER AUTHORITIES

ANNUAL REPORT TO CONGRESS ON THE STATUS OF THE HARBOR MAINTENANCE FUND FOR FISCAL YEAR 1998, (Dec. 1999).....3-5

James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 480 (1865)).....8

No. 00-482

In the

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

INTERESTS OF AMICUS CURIAE

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Defenders was founded as a non-profit legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion in to protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Keene Corp. v. United States*, 508 U.S. 200 (1993), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Bennett v. Spear*, 520 U.S. 154 (1997), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000), when they were before this Court.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

In 1986, Congress established the Harbor Maintenance Tax ("HMT"), as part of the Water Resources Development Act. 26 U.S.C. §§ 4461-62. The HMT applied a 0.125 percent *ad valorem* fee on the value of commercial cargo transported on vessels using federally maintained navigation projects. 26 U.S.C. § 4461. All HMT revenues collected were placed in a discrete fund maintained as the Harbor Maintenance Trust Fund ("HMTF").[2] 26 U.S.C. § 9505.

The HMTF funds did not sit idle; rather, they were invested in short- and long-term securities, earning interest which was also deposited into the HMTF. Over the course of an 11-year period during which the HMT was in effect, the Government reported that it had collected and deposited approximately $5.386 billion into the HMTF. ANNUAL REPORT TO CONGRESS ON THE STATUS OF THE HARBOR MAINTENANCE FUND FOR FISCAL YEAR 1998 at 13 (Table 4) (Pet. App. 53a). Of that total, the CIT estimated, as of September 30, 1998, that approximately $1.435 billion was

---

[2] In 1999, legislation was proposed to replace the HMTF with the Harbor Services Fund ("HSF") to establish a closer link between the revenue collected and the services provided to project users. *See* Harbor Services Fund Act of 1999, H.R. 1947, 106th Cong. (1999).

collected from exports, which now must be refunded to the exporters. *Id.* From 1988 to 1998, the government reported that it accrued approximately $267,873,000 as interest on the investments in short- and long-term securities. ANNUAL REPORT at 17 (Table 6) (Pet. App. 56a).

On March 31, 1998, the Court held that the HMT violated the Export Clause of the Constitution as it applies to exports. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (Pet. App. 1a-14a). The government has steadfastly contended that even though it must refund the export taxes that it unconstitutionally collected, it may nevertheless keep the interest the export taxes generated. To resolve this issue, the Court of International Trade ("CIT") designated this case as a "test case" to determine whether interest must be paid on the $1.289 billion collected under the unconstitutional HMT. *International Business Machines v. United States*, 201 F.3d 1367, 1370 (Fed. Cir. 2000) (citing *International Business Machines Corp. v. United States*, No. 94-10-00625, 1998 WL 325156 at *1, slip op. 98-78 (Ct. Int'l Trade June 17, 1998)) (Pet. App. 5a); *see also* ANNUAL REPORT at iv (Pet. App 47a). The CIT held that petitioner, and all other similarly situated exporters subject to the HMT, are entitled to the interest pursuant to 28 U.S.C. §

2411. *International Business Machines*, 1998 WL 325156 at *1 (Pet. App. 35a).

On appeal, the Federal Circuit Court of Appeals reversed, holding that there was no statutory basis for the award of interest on the tax refund. *International Business Machines Corp.*, 201 F.3d 1367 (Fed. Cir. 2000) (Pet. App. 3a-14a). Although the issue of interest has been raised in prior briefs in the course of this litigation, the court below did not address the questions of who owns the interest accrued on the HMTF and whether the government's refusal to return the interest to the petitioner violates the Fifth Amendment.

The decision of the court below that respondent may retain interest earned on funds rightfully belonging to petitioner, raises a Fifth Amendment takings issue remarkably similar to a case decided by this Court 20 years ago. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (holding that government must return interest on money deposited into a court interpleader fund); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (holding that any interest on principal attaches as a property right incident to the ownership of the underlying principal).

Accordingly, review by this Court is necessary to ensure that respondent's retention of monies earned on funds belonging to petitioner is not violative of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BACKGROUND PRINCIPLES OF COMMON LAW AND PRIOR DECISIONS OF THIS COURT HOLDING CONCLUSIVELY THAT OWNERSHIP OF INTEREST FOLLOWS OWNERSHIP OF THE UNDERLYING PRINCIPAL.

This Court has determined that the term "property" and the takings analysis is based on "background principals" of property law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In this case, the background principals of property law are well established. As a matter of property law, "interest follows principal," and therefore the owner of the corpus of a fund is also the owner of the interest earned on it. *See, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980); *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1201 (9th Cir. 1998).

The rule that interest follows principal has been established under English common law since at least the mid-1700s and is now "firmly embedded" in the common law of the States. *Phillips*, 524 U.S. at 165.

This Court has enunciated the proposition that interest follows principal in opinions dating all the way back to the early days of the Republic. *See, e.g., Himely v. Rose*, 9 U.S. (5 Cranch) 313, 318 (1809) ("interest goes with the principal, as the fruit with the tree.") This Court has more recently observed that:

> Permitting the owner of a sum of money to distribute to a designated beneficiary the interest income generated by his principal is entirely consistent with fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit.

Phillips, 524 U.S. at 167-68 (citing *United States v. General Motors Corp.,* 323 U.S. 373, 377-78 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to . . . dispose of it")).[3]

---

[3] In its broadest sense, "interest is the rental price of money." *Wilshire Holding Corp. v. C.I.R.*, 262 F.2d 51, 53 (9th Cir. 1958). This Court had defined interest in terms of payment for the use of money: "One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made." *Miller v.*

The foundational precept of property law, also applicable in this case, is that property rights protection is a bedrock civil right guaranteed by our Constitution. As James Madison, author of the Bill of Rights, put it: "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment.

Encompassed within the notion of property rights protection is the historical compact recorded in the Just Compensation Clause. While a government can, under certain circumstances, "take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. Const. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

Robertson, 266 U.S. 243, 257-58 (1924). The definition of interest, therefore, emphasizes the concept of remuneration to the owner of money

Thus, just as the Court in *Phillips v. Washington Legal Foundation* concluded that the State could "point to no 'background principles' of property law . . . that would lead one to the conclusion that the owner of a fund temporarily deposited in an attorney trust account may be deprived of the interest the fund generates," respondent can likewise point to no background principles of property law that would lead this Court to the conclusion that petitioner, whose money was wrongfully maintained in the HMTF, may be deprived of the interest (property) its money generated, without payment of just compensation. *Phillips*, 524 U.S. at 168.

II. THE GOVERNMENT IS CONSTITUTIONALLY OBLIGATED TO PAY BACK THE INTEREST THAT IT EARNED ON THE USE OF PETITIONER'S PROPERTY.

By limiting its decision to a review of sovereign immunity, the court below failed to complete the necessary analysis of ownership of the interest earned on the HMTF. Put succinctly, sovereign immunity is no defense to a claim of violation of the Just Compensation Clause, nor may the government simply declare itself the owner of a fund of money and then prohibit the true owner from asserting its

---

in return for temporarily giving up the custody and use of the money.

title. As this Court stated in *Jacobs v. United States*, 290 U.S. 13 (1933):

> That right [to just compensation] was guaranteed by the Constitution . . . The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. . . A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.

Id. at 16.

In this case, the government cannot prevail in its position that it is entitled to keep the interest on petitioner's money, however, because this Court has specifically held that the government violates the Just Compensation Clause of the Fifth Amendment when it fails to pay accrued interest on private funds. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Webb's Fabulous Pharmacies* is squarely on point with this case.

In *Webb's*, the petitioner entered into an agreement to purchase the assets of a corporation that was heavily in debt. *Id.* at 156. To protect its interests, the petitioner filed a complaint of interpleader in state court naming as defendants both the corporation and its creditors. *Id.* at 156-57. After satisfying the claims of various creditors and withdrawing court fees, the clerk then returned the remainder of the

interpleader account, but kept the interest that the account had earned while in the possession of the court. *Id.* at 158.

This Court held that the withholding of the payment of the interest on the interpleader fund was a "taking" of private property in violation of the Fifth Amendment and that "a State by *ipse dixit*, may not transform private property into public property without compensation" nor may a State legislatively abrogate the traditional rule that the "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. In so holding, the Court stated:

> Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." Rather the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts.

Id. at 163 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

The applicability of this Court's opinion in *Webb's Fabulous Pharmacies* to the present case could not be clearer. Exporters, including petitioner, who paid the unconstitutional HMT are now put in the position of making a "forced contribution" through the government's exaction of

the interest earned on their money while it was wrongfully maintained in the HMTF.

In *Webb's Fabulous Pharmacies*, the Court analogized the appropriation of the use of private property in physical takings cases to the government's appropriation of interest earned on private money. *Webb's*, 449 U.S. at 163-64. For example, the Court in *Webb's* relied on *United States v. Causby*, 328 U.S. 256 (1946), a physical takings case in which the Court held that the federal government had appropriated the airspace above private property for the flight pattern of military aircraft. *Causby*, 328 U.S. at 262.

Similarly, and only two years ago, this Court again faced the issue of government expropriation of interest on private money—the interest earned on client funds held in Interest on Lawyers Trust Accounts ("IOLTA"). *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In *Phillips*, the interest in question was generated on client funds held for a short period of time in interest-bearing accounts. *Id.* at 161-62. Under State law, the interest earned on the client funds was not paid to the clients but rather was deposited in an IOLTA account and paid to the Texas Equal Access to Justice Foundation ("TEAJF"), a nonprofit foundation established by the Texas Supreme Court. *Id.* at 162. TEAJF then distributed the funds to nonprofit

organizations that provided legal services to low income persons. *Id.*

In *Phillips*, the State argued that the interest generated on the IOLTA funds was not the property of the client because the interest generated was the result of the State-created IOLTA program. *Id.* at 168-69. The Solicitor General further argued as *amicus curiae* in that case that the interest was not private property because the interest is a government-created value. *Id.* at 170. The Court, however, flatly rejected these arguments stating that "the State does nothing to create value; the value is created by respondents' funds." *Id.* at 171. Thus, the *Phillips* Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.* at 172.

Now, again, this Court has before it another attempt by government to transform interest earned on private money into public property. In the present case, however, respondent does not even have the argument that the interest was "government created," since the interest earned was, by respondent's own admission, generated by investment of the monies unlawfully collected from petitioner. In *Webb's* and *Phillips*, discussed above, the government was at least able to argue (albeit unsuccessfully) that it performed some service

by holding the interpleaded funds, or establishing the IOLTA interest bearing accounts. Here the "service" rendered was the collection of an unconstitutional tax—an illegal act. The court below cites no authority, and we are aware of none, holding that one who unlawfully acquires control of funds may, upon being required to return them, keep for itself the interest earned on those funds. Yet that is the result of the holding below.

CONCLUSION

This case grew out of the government's imposition of an export tax which violated one provision of our Constitution. Left standing, the decision of the court below would allow the government to profit handsomely from that unconstitutional enactment by retaining a portion of the Harbor Maintenance Trust Fund—the interest earned on monies rightfully belonging to petitioner—in violation of another provision of the Constitution, the Just Compensation Clause of the Fifth Amendment. This compounding of constitutional violations is contrary to existing precedents of this Court. Accordingly, it is incumbent upon this Court to resolve this issue.

Respectfully submitted,

Nancie G. Marzulla
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., N.W.
Suite 410
Washington, D.C. 20036
202-822-6770

Counsel for *Amicus Curiae*

Dated: December 15, 2000

Supreme Court, U.S.
FILED

DEC 15 2000

OFFICE OF THE CLERK

(5)

No. 00-482

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR THE PETITIONER

SUSAN G. BRADEN
Counsel of Record
WILLIAM D. OUTMAN, II
KEVIN M. O'BRIEN
TERESA A. GLEASON
MICHAEL E. MURPHY
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075

Counsel for Petitioner

Balmar Legal Publishing Services, Washington, DC (202) 682-9829

18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

TABLE OF AUTHORITIES

CASES: **Page**

American Nat'l Bank & Trust Co. of Chicago v. *Haroco, Inc.*, 473 U.S. 606 (1985) 7

Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) 2

First English Evangelical Lutheran Church of Glendale v. *County of Los Angeles*, 482 U.S. 304 (1987) 7

Granfinanciera, S.A. v. *Norberg*, 492 U.S. 33 (1989) 7

International Business Machines Corp. v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) ..... *passim*

Library of Congress v. *Shaw*, 478 U.S. 310 (1986) ..... *passim*

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 7

Marbury v. *Madison*, 5 U.S. 137 (1803) 7

Mazer v. *Stein*, 347 U.S. 201 (1954) 7

McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940) 7

Smyth v. *United States*, 302 U.S. 329 (1937) 6

Stone v. *Powell*, 428 U.S. 465 (1976) 7

United States v. *Louisiana*, 446 U.S. 253 (1980) 6

United States v. *United States Shoe Corp.*, 523 U.S. 360 (1998) ..... *passim*

STATUTORY PROVISIONS:

26 U.S.C. §§ 4461-4462 ..... *passim*

26 U.S.C. § 9505(b) 3

26 U.S.C. § 9505(c) 3

28 U.S.C. § 2411 ..... *passim*

CONGRESSIONAL REPORTS:

Annual Report To Congress On The Status Of The Harbor Maintenance Trust Fund For Fiscal Year 1998 (Dec. 1999) (Selected Portions) 3, 4

OTHER AUTHORITIES:

Charles Alan Wright, *Law of Federal Courts* (5th ed. 1994) 4, 5

Charles Alan Wright, Arthur R. Miller & Edwin A. Cooper, *Federal Practice and Procedure* (1981) and 2000 Supplement 2

Restatement (Second) of Judgments (1982) 5

Supreme Court Rule 10(a) 5

No. 00-482

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR THE PETITIONER

The Government responds to the statutory component of the first question presented,[1] by arguing that petitioner is not entitled to receive interest under 28 U.S.C. § 2411 because that statute does not "directly and unambiguously provide for an award of interest for customs assessments." Brief In Opposition ("Br. In Opp.") at 5. This Court, however, directly, unambiguously, and unanimously determined in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) that the Harbor Maintenance Tax, 26 U.S.C. §§ 4461-4462 ("HMT"), was *not* a "customs assessment," but a "*tax*

[1] The first question presented has three components: Whether the court of appeals misconstrued 26 U.S.C. § 4462(f)(3) in light of the decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the preclusive effect of the final judgment entered thereunder, and the "constitutional requirements" exception to the "no-interest" rule noted in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

on exports in operation as well as nomenclature . . . despite the label Congress has put on it[.]" *Id.* at 367 (emphasis added). And, that tax was held to be unconstitutional. *Id.* at 370. Since 28 U.S.C. § 2411 requires that federal courts award interest on *tax* refunds and complies with the restrictions of 26 U.S.C. § 4462(f)(3), the United States Court of International Trade ("CIT") entered an order implementing this Court's decision in *United States Shoe Corp.* by awarding petitioner both a refund of the monies paid under the HMT on exports and interest on those payments. App. 35a.

By failing to accord deference to this Court's prior ruling that the HMT on exports was a *tax*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") ignored long established rules "developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." Charles Alan Wright, Arthur R. Miller & Edwin A. Cooper, *Federal Practice and Procedure* § 4478 (1981); *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 815 (1988) (citations omitted) (The law-of-the-case doctrine is a "rule of law, that [a] decision should continue to govern the same issues in subsequent stages in the same case.[2] This rule of practice

---

[2] As a matter of law, the instant case is a continuation of the same action previously before this Court in *United States Shoe Corp.* After this Court issued its March 31, 1998 decision, the CIT was advised that the plaintiff in *United States Shoe Corp.* was not in a position to litigate its claim for the payment of interest on the HMT export refunds required as a result of the Court's decision in *United States Shoe Corp.* The CIT then entered a judgment on June 17, 1998 with the consent of all parties, wherein the record and all prior orders in *United States Shoe Corp.* were "deemed filed" in *International Business Machines Corp.* v. *United States.* App. 35a. This judgment also awarded petitioner a refund of the HMT paid on exports together with interest pursuant to 28 U.S.C. § 2411.

The Government correctly notes that the CIT also entered a similar judgment on June 26, 1998 in *United States Shoe Corp.* (Supp. App. 58a), from which the Government filed a notice of appeal in the Federal Circuit on August 7, 1998. Br. In. Opp. at 3, note 1. United States Shoe, however, filed a motion in the Federal Circuit to stay any further briefing until the

promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'").

The Court's decision in *United States Shoe Corp.* settled that the HMT is a tax and because that tax is a tax on exports, it is unconstitutional, which necessarily required the CIT to remedy the constitutional harm imposed making petitioner whole by refunding the monies paid pursuant to the HMT on exports and interest earned on those monies. A federal court has no discretion under 28 U.S.C. § 2411 concerning the award of interest. ("[I]nterest *shall* be allowed.") App. 43a. (emphasis added). Moreover, since 28 U.S.C. § 2411 is outside the scope of Subtitle F and does not in any respect regulate "the administration and enforcement of internal revenue taxes"[3] the CIT's award of interest under 28 U.S.C. §

---

proceedings in the instant case were concluded, which was granted. Supp. App. 61a. For the convenience of the Court, both of these orders are reprinted in a supplemental appendix following the text of this brief.

Petitioner assumes that the Government raised the technical pendency of its appeal in *United States Shoe Corp.* to suggest that docket has vitality in the Federal Circuit. The principles of finality and repose that should have been raised to bar the Government from appealing the CIT's 1995 judgment and preclude the Federal Circuit from asserting jurisdiction over the Government's appeal of the CIT's award of interest will bar the Government if it attempts to continue to pursue that appeal.

[3] The Government does not dispute that over 7,000 taxpayers will be affected by the disposition of this case where millions of dollars are at stake because the Government violated the Constitution and seeks to benefit financially from its offense. Presumably those taxpapyers are to take solace in being advised that "The money placed in the [HMT] Fund, and interest earned on those monies, may be withdrawn only by appropriation for specified purposes." Brief In Opp. at 7 note 3 *citing* 26 U.S.C. § 9505(b), (c). 26 U.S.C. § 9505(b), however, speaks only to "amounts equivalent to the taxes received" *not* interest earned thereunder and 26 U.S.C. § 9505(c) speaks only to "amounts available . . . for making expenditures." Therefore, no apparent appropriations constraints are contained in 26 U.S.C. § 9505(b), and under 26 U.S.C. § 9505(c), it is far from clear that interest earned on monies paid into the HMT Fund have been "withdrawn only by appropriations for specified purposes," since the most recent Annual Report to Congress on the Status of the HMT Fund states: "the . . . (interest actually collected) is available for *transfer* from

2411 did not contravene 26 U.S.C. § 4462(f)(3) as the Federal Circuit erroneously held.

The Government also argues that the Court should not grant a writ regarding the jurisdictional component of the first question presented.[4] The Government contends that petitioner is barred from asserting the preclusive effect of the CIT's December 4, 1995 final judgment because petitioner did not raise this issue in the most recent Federal Circuit proceedings. Br. In. Opp. at 7-9. Petitioner does not deny that it did not raise this issue. Nor does petitioner deny that all parties stipulated in the CIT that the instant action should be designated as a "test case" to allow the Government the opportunity to appeal the CIT's award of interest under 28 U.S.C. § 2411. Pet. 35a.

As a matter of law, however, the preclusive effect of a final judgment is a threshold question concerning the jurisdiction of a federal court, which may not be governed by stipulation of the parties nor waived by a court. See Charles Alan Wright, *Law of Federal Courts,* 28 (5th ed. 1994) ("[T]he parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress. The parties cannot waive lack of jurisdiction. . . . *The court*, whether trial or appellate, *is obligated* to notice want of jurisdiction on its own motion, and it may well happen that the party who has invoked the jurisdiction of the federal court will challenge the jurisdiction . . . at a late stage of the proceedings after it has lost on the merits.") (citations omitted) (emphasis added). To be sure, petitioner has raised this issue belatedly, but it has appropriately requested that the Court grant certiorari to permit briefing on this determinative

---

the fund and is reported by the Treasury Department to the Office of Management and Budget." App. 55a (parenthetical in original).

App. 55a, is also the correct appendix reference for the last paragraph of page 13 of the Petition, rather than 60a, which was a typographical error.

[4] *Supra* note 1.

issue. See Sup. Ct. R. 10(a) (certiorari may be granted where a "United States court of appeals has decided an important federal question in a way that . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers.").

It is well established that the preclusive effect of a final judgment includes all claims that were, or could have been, raised by an appellant. See Charles Alan Wright, *Law of Federal Courts*, 562 (5th ed. 1994) (citing Restatement (Second) of Judgments §§ 22-26 (1982)) ("'claim preclusion . . . requires all grounds upon which a single claim is based to be asserted and included in *one action, on pain of being barred from separate suit.*'") (emphasis added). Therefore, petitioner suggests that the Court grant the petition either to remand this issue for briefing and consideration by the Federal Circuit or to consider the merits. If the requisite elements of *res judicata* are met, the Court has no alternative but to vacate the decision in *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000).

The Government's opposition to the constitutional component of the first question and the second[5] and third questions[6] presented by the petition arise because the Federal Circuit justified embarking on a *de novo* review of the HMT by invoking the doctrine of sovereign immunity, revisited by the Court in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). See *International Business Machines Corp.*, 201 F.3d

---

[5] The second question presented by the petition is: Whether in holding the Harbor Maintenance Tax on exports unconstitutional in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the Court recognized that a taking of private property also occurred for which "just compensation" is required by the Fifth Amendment.

[6] The third question presented by the petition is: Whether the Government's retention of interest earned on monies collected under the unconstitutional Harbor Maintenance Tax on exports is a taking of private property for which "just compensation" is required by the Fifth Amendment.

at 1372. ("[W]e are bound by the ["no-interest"] rule [of *Shaw*] that the United States is liable for interest only if Congress has waived sovereign immunity by expressly consenting to an award of interest."). Because the Federal Circuit determined that the doctrine of sovereign immunity precludes the award of interest on HMT refunds, petitioner's Takings Clause claim is now ripe for adjudication. That doctrine, however, is not applicable where the Takings Clause has been violated:

> *Apart from constitutional requirements*, in the absence of specific provision by contract or statute, or "express consent . . . by Congress," interest does not run on a claim against the United States. *United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980), *quoting Smyth* v. *United States*, 302 U.S. 329, 353 (1937).

Shaw, 478 U.S. at 317 (emphasis added).

Contrary to the Government's claim, petitioner-appellee was not compelled to assert constitutional claims defensively to support the judgment of the CIT. In fact, there was no reason for petitioner-appellee to raise prematurely constitutional questions that the CIT had not yet adjudicated. App. 35a. Indeed, until the Federal Circuit embraced the doctrine of sovereign immunity to bar the award of interest it would have been improper for the CIT to consider these constitutional questions. Moreover, the Federal Circuit's reliance on *Shaw* to bar the payment of interest under the doctrine of sovereign immunity *before* petitioner's Takings Clause claim was adjudicated is erroneous as a matter of law and an abuse of discretion. The Federal Circuit was aware, not only from the pleadings in the CIT, but from the Government's brief (Br. In Opp. at 3) and rehearing briefs of petitioner and amici that petitioner's Takings Clause claim was still pending at the CIT. Nevertheless, the Federal Circuit continued to maintain that *Shaw* allows the Government to retain interest earned on monies secured by violating the United States Constitution. Petitioner is aware of no authority

that condones such greviously offensive conduct. *Marbury* v. *Madison*, 5 U.S. 137, 165 (1803) (stating whether a sovereign's action is immune "must always depend on the nature of that act.").

Therefore, it is not surprising that not even one of the cases cited by the Government precludes this Court's plenary review of constitutional questions raised and preserved in the trial court and for which certiorari properly has been requested.[7] On other occasions, where the Court has been presented with a record where a constitutional claim was raised and preserved at trial, as is the case here, either it has granted the petition for a writ of certiorari and resolved the question, particularly where the law is unsettled, see, *e.g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1012 n. 3 (1992) *citing First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 312-313 (1987) (certiorari granted where Takings Clause claims were at issue), or remanded to the lower courts for further consideration of the constitutional question, without prejudice to further review by the Court. See, *e.g.*, *McGoldrick*, 309 U.S. at 435 ("Upon the remand . . . courts will be free to decide any Federal question remaining

---

[7] Every case cited by the Government stands only for the principle that new issues may not be raised beyond the scope of the questions granted by a petition for certiorari. See Br. In Opp. at 9-10 *citing Granfinanciera, S.A.* v. *Norberg*, 492 U.S. 33, 38-39 (1989) (having granted certiorari the Court declined to address argument "respondent failed to raise . . . because the question it poses has not been adequately brief and argued"); *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976) (declining to address "issue of the substantive scope of the writ [when it] was not presented in the petition for certiorari"); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940) (record did not disclose whether respondents' arguments were presented); *American Nat'l Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 608-607 (1985) (having granted certiorari the Court declined to address a new question not presented in the petition); *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954) ("We do not reach for constitutional questions not raised by the parties. . . . The fact that the issue was mentioned in argument does not bring the question properly before us.").

undecided here which, in conformity with their own procedure, may be raised for decision there, and the remand will be *without prejudice* to the further presentation of any such question to this Court.") (emphasis added).

Accordingly, the Court should grant the petition to consider all three of the questions presented. Regarding the first question presented, if the Court agrees that the jurisdictional issue raised concerning the preclusive effect of the CIT's 1995 final judgment requires adjudication, it may remand that issue to the Federal Circuit or reach the merits and reverse summarily or vacate that court's decision. In the alternative, if the Court grants the petition and determines that its ruling in *United States Shoe Corp.* that the HMT on exports is a tax necessarily requires the payment of interest under 28 U.S.C. § 2411, then the Court should reverse the decision of the Federal Circuit. On the other hand, if the Court grants the petition and decides that the Federal Circuit's statutory interpretation was correct, then petitioner's Takings Clause claim is ripe for adjudication, either by this Court or the CIT, *before* it can be determined whether or not the doctrine of sovereign immunity applies.

If the Court decides to consider and adjudicate the second question concerning petitioner's Takings Clause claim, no further lower court proceedings will be required. The Government's sole objection to this question is that it was not presented first to the Federal Circuit. Br. In Opp. at 7. Since this question asks the Court to clarify whether its decision in *United States Shoe Corp.*, 523 U.S. at 369 also determined that the Takings Clause was violated, it properly is addressed to this Court so that it may clarify the scope of a prior judgment.

Finally, if the Court decides to remand initial consideration of petitioner's Takings Clause claim to the CIT, the third question asks the Court to further clarify how the analysis of a *per se* taking and a regulatory taking should be conducted, so that additional appellate litigation about the appropriate standard of review is not required.

The Court should grant the petition for a writ of certiorari to consider the merits of all three questions presented.

Respectfully submitted,

SUSAN G. BRADEN
Counsel of Record
WILLIAM D. OUTMAN, II
KEVIN M. O'BRIEN
TERESA A. GLEASON
MICHAEL E. MURPHY
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075

Counsel for Petitioner

Dated: December 15, 2000
Washington, D.C.

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

UNITED STATES SHOE CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

JUDGMENT

Upon consideration of Plaintiff's Motion for an Order Settling Interest and Costs, defendant's response thereto, and all other proceedings had herein; and

WHEREAS, a three-judge panel of this Court entered a judgment for plaintiff on December 4, 1995, declaring the Harbor Maintenance Tax as imposed upon merchandise exported from the United States to be unconstitutional, enjoining the United States Customs Service from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States, and awarding plaintiff a money judgment in the amount of $8,281.87, together with interest and costs as provided by law; and

WHEREAS this Court determined in Slip Op. 96-32 (February 7, 1996) that plaintiff is entitled to interest on the money judgment awarded in this case, pursuant to 28 U.S.C. § 2411; and

WHEREAS at the time the Court issued Slip Op. 96-32, the Government already had noticed an appeal of this case on February 1, 1996, and Slip Op. 96-32 specifically notes that

"notice of appeal has been filed and the court lacks jurisdiction to alter the judgment;" and

WHEREAS the December 4, 1995 judgment of the Court in this case was affirmed by the United States Court of Appeals for the Federal Circuit on June 3, 1997, in *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997); and

WHEREAS the decision of the United States Court of Appeals for the Federal Circuit in *United States Shoe Corp. v. United States* was affirmed by the Supreme Court of the United States on March 31, 1998, in *United States v. United States Shoe Corp.*, 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1988), which decision is now final; and

WHEREAS the stay of execution of the money judgment awarded to plaintiff and the effect of the declaratory and injunctive relief, ordered by the Court on December 4, 1995, by its terms automatically dissolved upon "the conclusion of any appellate proceedings"; and

WHEREAS defendant expressly reserves any right remaining to appeal the award of interest or any costs in this case;

WHEREAS, the court has previously determined that costs shall be awarded as provided by law, the court has discretion to award costs, and plaintiff pursued diligently this test case of minor principal value; it is hereby

(1) ORDERED that further briefing is not required and Slip Op. 96-32 is hereby readopted as the opinion of the court on the issue of interest.

(2) ORDERED that defendant pay plaintiff the principal amount owing of $8,281.87 within 60 days hereof;

(3) ORDERED that defendant pay plaintiff $403.63 in costs within 60 days hereof;

(4) ORDERED that defendant pay plaintiff interest on the aforementioned $8,821.87 principal, calculated under 28

U.S.C. § 2411, and that the payment obligation is stayed until 30 days after the time for appeal expires or appellate proceedings are complete.

/s/_____
Jane A. Restani
JUDGE

Dated: New York, New York
This 26th day of June, 1998.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1574

UNITED STATES SHOE CORPORATION
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

98-1590

INTERNATIONAL BUSINESS MACHINES CORP.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

ON MOTION

Before BRYSON, Circuit Judge.

ORDER

United States Shoe Corporation moves to stay the briefing schedule in appeal no. 98-1574 "until 30 days after the conclusion of all appellate proceedings in *International Business Machines Corp. v. United States,* Appeal No. 98-1590 before this Court and any higher Court." US Shoe states that the United States does not oppose.

US Shoe states that the Court of International Trade chose the IBM case as the "test case" to resolve the government's liability for interest on refunds of Harbor Maintenance Tax payments. US Shoe states that the Court of International Trade also entered judgment, including interest, in its case following the Supreme Court's decision in *United States v. United States Shoe Corp.*, 118 S.Ct. 1290 (1998).

Upon consideration thereof,

IT IS ORDERED THAT:

(1) US Shoe's motion is granted in part; appeal no. 98-1574 is stayed, pending this court's final disposition of appeal no. 98-1590. Within 21 days of the final disposition of appeal no. 98-1590, the United States shall provide the court with its views concerning how appeal no. 98-1574 should proceed. US Shoe may also notify the court of its views during that time.

(2) Copies of this order shall be transmitted to the merits panel assigned to hear appeal no. 98-1590.

December 1, 1998 /s/_____

William C. Bryson
Circuit Judge

cc: Harvey A. Isaacs, Esq.
Lara Levinson, Esq.
William D. Outman, II, Esq.

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

Supreme Court, U.S.
FILED
JAN 2 2001
OFFICE OF THE CLERK

No. 00-482

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Concerning the December 19, 2000 Decision of the United States Court of Appeals for the Fourth Circuit in *Mary Helen Coal Corp.* v. *Hudson*

SUSAN G. BRADEN
Counsel of Record
WILLIAM D. OUTMAN, II
KEVIN M. O'BRIEN
TERESA A. GLEASON
MICHAEL E. MURPHY
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075

Counsel for Petitioner

Balmar Legal Publishing Services, Washington, DC 20005 (202) 682-9829

7 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
SUPPLEMENTAL BRIEF 1

TABLE OF AUTHORITIES

CASES: **Pages**

Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) 2

Koon v. *United States*, 518 U.S. 81 (1996) 3

International Business Machines Corp. v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) 1, 4

Mary Helen Coal Corp. v. *Hudson*, 57 F. Supp. 2d 318 (E.D. Va. 1999) 2

Mary Helen Coal Corp. v. *Hudson*, 2000 WL 1854053 (4th Cir. Dec. 19, 2000)..... *passim*

Osterneck v. *Ernst & Whinney*, 489 U.S. 169 (1989) 3

Phillips v. *Washington Legal Foundation*, 524 U.S. 156 (1998) 2, 3

Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980) 2

STATUTES:

Coal Industry Retiree Health Benefit Act of 1992 2

Harbor Maintenance Tax, enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. §§4461-4462 3

No. 00-482

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Concerning the December 19, 2000 Decision of the United States Court of Appeals for the Fourth Circuit in *Mary Helen Coal Corp.* v. *Hudson*

On December 19, 2000, Chief Judge Harvey Wilkinson issued an unanimous decision for the United States Court of Appeals for the Fourth Circuit in *Mary Helen Coal Corp.* v. *Hudson*, 2000 WL 1854053 (4th Cir. Dec. 19, 2000)[1] that stands in direct conflict with the decision of the United States Court of Appeals for the Federal Circuit in this case, for which a petition for a writ of certiorari has been filed, and is scheduled for this Court's consideration on January 5, 2001. See *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000), *petition for certiorari filed*,

[1] This case is also reported at http://www.law.emory.edu/4circuit/dec2000/992181.P.html.

69 U.S.L.W. 3259 (U.S. Sept. 28, 2000) (No. 00-482). The relevance and importance of *Mary Helen Coal Corp.* to the pending petition cannot be overstated.[2]

As a result of *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), a federal district court awarded Mary Helen Coal Corp. payment of all outstanding premiums collected under the Coal Industry Retiree Benefit Act of 1992, because this Court held that act was unconstitutional. See *Mary Helen Coal Corp.* v. *Hudson*, 57 F. Supp. 2d 318 (E.D. Va. 1999). The district court, however, declined to award Mary Helen Coal Corp. prejudgment interest. *Id.* On December 19, 2000, the United States Court of Appeals for the Fourth Circuit, reversed holding that where money is collected under a law that subsequently is determined to be unconstitutional, the award of prejudgment interest "would simply give full effect to the Supreme Court's decision . . . by providing full compensation for the harms suffered." *Mary Helen Coal Corp.* at 2000 WL 1854053 at *2. That appellate court further reasoned:

> The usual rule that "interest follows principal" is long and well established. See *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998). See also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162 (1980). . . . Read together, therefore, Eastern and Phillips indicate that Mary Helen receive pre-judgment interest on the premiums it paid. It is undisputed that after Eastern the Trustees had to refund the principal amounts paid. . . . Since the principal belonged to Mary Helen, so too did the interest earned. That the Trustees collected the premiums in good faith does not change the fact that doing so violated Mary Helen's constitutional rights. Thus, to deny an

---

[2] Petitioner filed its Reply Brief on December 15, 2000, prior to the issuance of *Mary Helen Coal Corp.* on December 19, 2000.

> award of prejudgment interest would undercut the Supreme Court's jurisprudence.
>
> Prejudgment interest is simply "an element of " Mary Helen's "complete compensation." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 175 (1989).... Thus, an award of prejudgment interest is a critical component of Mary Helen's recovery.
>
> Mary Helen is thus presumptively entitled to an award of prejudgment interest.

Mary Helen Coal Corp., 2000 WL 1854053 at **2-3 (citations omitted).

The United States Court of Appeals for the Fourth Circuit also specifically overruled the district court's refusal to award prejudgment interest in the absence of specific statutory authority, holding that "prejudgment interest is mandated if we are to give meaning to the rule that 'interest follows principal.' *Phillips*, 524 U.S. at 165." *Mary Helen Coal Corp.*, 2000 WL 1854053 at *3. Moreover, the appellate court further declared that "the district court's denial of prejudgment interest was an abuse of discretion 'guided by erroneous legal conclusions.' *Koon* v. *United States*, 518 U.S. 81, 100 (1996)." *Mary Helen Coal Corp.*, 2000 WL 1854053 at *3.

In short, the United States Court of Appeals for the Fourth Circuit in *Mary Helen Coal Corp.* has unanimously and unequivocally held that this Court's jurisprudence in *Eastern* and *Phillips* requires that prejudgment interest must be awarded as a "critical component" of recovery, when monies have been collected pursuant to a law that violates a constitutional mandate.[3] *Id.* By contrast and in direct conflict,

---

[3] In the instant case, petitioner is seeking prejudgment interest from 1987 to June 17, 1998, the date of the judgment awarding interest by the United States Court of International Trade in this docket. In addition, petitioner seeks post judgment interest on monies paid under the Harbor

the United States Court of Appeals for the Federal Circuit has unanimously and unequivocally held that no interest, including prejudgment interest, should be awarded where monies have been collected pursuant to a law that violates a constitutional mandate without specific statutory authority from Congress. See *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000).

Therefore, the Court should grant the petition for a writ of certiorari for all the reasons set forth in petitioner's prior briefs and also now resolve a significant and intolerable division among the federal circuit courts of appeal concerning the scope of redress required to remedy a violation of the United States Constitution.

Respectfully submitted,

SUSAN G. BRADEN
Counsel of Record
WILLIAM D. OUTMAN, II
KEVIN M. O'BRIEN
TERESA A. GLEASON
MICHAEL E. MURPHY
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075
Counsel for Petitioner

Dated: January 2, 2001
Washington, D.C.

Maintenance Tax on exports that were unlawfully retained by Government from June 17, 1998 to date.